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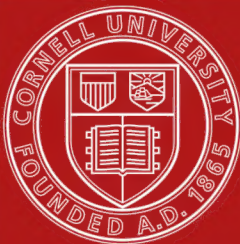
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A

SELECTION OF CASES

ON

PRIVATE CORPORATIONS.

BY

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IN TWO VOLUMES.

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TABLE OF CONTENTS.

VOLUME II.

CHAPTER XV.

	PAGE
DISSOLUTION OTHER THAN BY FORFEITURE OR BY RESERVED LEGISLATIVE POWER OF REPEAL	604

CHAPTER XVI.

DISTRIBUTION OF ASSETS IN CASE OF DISSOLUTION	608
---	-----

CHAPTER XVII.

LEGISLATIVE CONTROL	622
SECTION I. How far Repeal, Change of Charter, or Confiscation is prohibited by the U. S. Constitution, or by State Constitutions	622
SECTION II. Extent of Police Power, where Charter does not contain any Express Reservation of Power	681
SECTION III. Reserved Power in Legislature to repeal Charter	707
SECTION IV. Reserved Power in Legislature to alter or amend Charter	740

CHAPTER XVIII.

RIGHT OF CORPORATE CREDITOR TO COMPEL SHAREHOLDER TO PAY THE FULL PAR VALUE OF HIS STOCK. RIGHTS OF SHAREHOLDERS <i>INTER SESE</i> TO COMPEL SUCH PAYMENT	812
---	-----

CHAPTER XIX.

STATUTORY LIABILITY OF SHAREHOLDER TO CREDITOR OF CORPORATION, OVER AND ABOVE SHAREHOLDER'S LIABILITY TO PAY IN FULL THE AMOUNT SUBSCRIBED BY HIM FOR STOCK	875
---	-----

CHAPTER XX.

	PAGE
POWER OF CORPORATION TO BECOME A MEMBER OF A COPARTNERSHIP OR TRUST	935

CHAPTER XXI.

POWER OF CORPORATION TO OWN SHARES IN ANOTHER CORPORATION	952
---	-----

CHAPTER XXII.

POWER OF CORPORATION TO PURCHASE ITS OWN SHARES	974
---	-----

CHAPTER XXIII.

POWER OF AN INSOLVENT CORPORATION TO PREFER PARTICULAR CREDITORS	990
--	-----

CHAPTER XXIV.

VOTING RIGHTS OF SHAREHOLDERS	1019
---	------

CHAPTER XXV.

TRANSFER OF SHARES	1065
------------------------------	------

APPENDIX	1143
--------------------	------

SELECT CASES
ON
PRIVATE CORPORATIONS.

CHAPTER XV.

DISSOLUTION OTHER THAN BY FORFEITURE OR BY
RESERVED LEGISLATIVE POWER OF REPEAL.

BOSTON GLASS MANUFACTORY v. LANGDON.

1834. 24 *Pickering* (Mass.), 49.¹

ASSUMPSIT on a promissory note given by the defendant to the plaintiffs. The defendant pleads in abatement, that at the time of the purchase of the writ there was not, and now is not, any such corporation established by law, called the Boston Glass Manufactory, as in and by the writ is supposed. The plaintiffs reply that there was and is such a corporation; and tender an issue; which is joined.

At the trial, before *Morton, J.*, the plaintiffs offered in evidence their act of incorporation, and showed their organization under it in 1811.

The records of the corporation were introduced by the plaintiffs, and were used and relied upon by both parties.

The defendant then introduced an indenture, dated the 27th of May, 1827, assigning all the property of the corporation to certain persons, in trust to pay, *pro ratâ*, such creditors as should become parties to the indenture. This instrument contained covenants, that the assignees might use the name of the corporation in the collection of the debts, and in the disposition of the property assigned; that the corporation would not hinder or obstruct them in the performance of these functions; and that it would make any further conveyances and assurances which might become necessary, and perform any other and further acts which might be required to enable the assignees fully to execute their trust. No provision was made for a release to the corporation by the creditors, nor for paying over to the corporation the surplus, if any, of the property assigned. The defendant also referred to all the records subsequent to 1817, and contended that the assignment of the property of the corporation, and the omission to hold annual meetings, to choose directors, and to transact business, as appears by the records and books of the corporation, supported the issue on her part and entitled her to a verdict.

¹ Argument omitted. — Ed.

But the jury were instructed, that the evidence was competent to prove the establishment and continuance of the corporation down to the present time.

The plaintiffs then claimed to have the damages assessed by the jury, if they found a verdict in their favor, and offered in evidence the note declared on. This was objected to by the defendant, because the note had been assigned. But the objection was overruled.

The defendant then offered to prove that the note was without consideration. This evidence was objected to and was excluded.

The jury found a verdict for the plaintiffs for the whole amount of the note and interest.

The defendant excepted to the decisions and instructions of the judge; and for the reasons above appearing, moved for a new trial.

Austin, for the defendant.

Sullivan, for the plaintiffs.

MORTON J. delivered the opinion of the Court.¹ The non-existence or death of the plaintiff may properly be pleaded in abatement. 1 Chitty's Pl. 482; Story's Pl. 24. But whether, as it entirely and perpetually destroys the plaintiff's right to recover, it may not also be pleaded in bar, it is not necessary to determine. *Proprietors of Monumoi v. Rogers*, 1 Mass. R. 159; *First Parish in Sutton v. Cole*, 3 Pick. 245. Whether the plea conclude in abatement or bar, the issue being found against the defendant, the judgment must be peremptory. The established rule is, that in dilatory pleas, when the issue is found against the defendant on matters of fact, the judgment must be in chief. Gould's Pl. 300; Howe's Pract. 215.

The principal question for our consideration is, whether judgment shall be rendered on the verdict. The defendants' counsel contends that the evidence introduced will not support the verdict, but that the verdict is against the evidence and the law and should be set aside.

The point which has been determined by the jury, though necessary to be submitted to them with proper instructions, is quite as much a matter of law as of fact; and we the more readily enter into the examination of it.

The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on corporations describe four methods in which they may be dissolved. It is said that private corporations may lose their legal existence by the act of the legislature; by the death of all the members; by a forfeiture of their franchises; and by a surrender of their charters. 2 Kyd on Corp. 447; 1 Bl. Comm. 485; 2 Kent's Comm. (1st ed.) 245; Angell & Ames on Corp. 501; *Oakes v. Hill*, 14 Pick. 442. No other mode of dissolution is anywhere mentioned or alluded to.

1. In England, where the parliament is said to be omnipotent and

¹ *Shaw*, C. J., did not sit in the cause.

where in fact there is no constitutional restraint upon their action, but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the legislature. But if they possess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legislative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it cannot go, it has become a question of some difficulty to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiffs' charter, it will not be useful further to discuss this branch of the subject.

2. As all the original stockholders are not deceased, the corporation cannot be dissolved for the want of members to sustain and exercise the corporate powers. Besides, this mode of dissolution cannot apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation as long as it may exist.

3. Although a corporation may forfeit its charter by an abuse or misuser of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal. 2 Kent's Comm. (1st ed.) 249; *Corporation of Colchester v. Seaber*, 3 Burr. 1866; *Smith's case*, 4 Mod. 53. Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to this effect be passed, they will continue their corporate existence. *The King v. Amery*, 2 T. R. 515.

4. Charters are in many respects compacts between the government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal solemn act of the corporation; and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act, would be a dangerous power, and one which cannot be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect. The instrument of assignment was not so intended, and cannot

be so construed. All its provisions look to the continuance of the corporation. It contains covenants that the assignees may use the corporate name for the collection of the debts and the disposition of the property assigned; that the corporation will not hinder or obstruct them in the performance of these functions; that it will make any further conveyances and assurances which may become necessary, and will do and perform any other and further acts which may be required to enable the assignees fully to execute their trust. The instrument which covenants for future acts, cannot be construed to take away all power of action.

The omission to choose directors clearly does not show a dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers and the want of power to elect them, would not be fatal to its existence. It has a potentiality which might, by proper authority, be called into action, without affecting the identity of the corporate body. *Colchester v. Seaber*, 3 Burr. 1870.

But here in fact was no lack of officers. Although no directors had been chosen for several years, yet, by the by-laws of the corporation, the directors, though chosen for one year, were to continue in office till others were chosen in their stead.

The damages were properly assessed by the jury. The defendant having elected to try her case upon a plea in abatement, must submit to the legal consequences of that form of trial. Perhaps the Court might have assessed the damages as in case of default. But most obviously the better course was to submit the subject to a jury. In doing this the defendant could not be allowed to go into the whole defence as upon the general issue. The rule adopted at the trial was the correct one.

Judgment according to verdict.

CHAPTER XVI.

DISTRIBUTION OF ASSETS IN CASE OF DISSOLUTION.

FOSTER v. ESSEX BANK.

1820. 16 *Massachusetts*, 245.¹

ASSUMPSIT for 50,000 dollars had and received by the defendants, to the use of *Israel Foster*, the plaintiff's testator.

The action was entered at the last April term, and at this term the following suggestion was filed, *viz.* — “*And now William Prescott and Leverett Saltonstall, who were originally retained in this action by the Directors of the Essex Bank, suggest that, since the last term of the court, the corporation of ‘the President, Directors and Company of the Essex Bank’ is dissolved by the expiration of the time limited for its duration, in the act of incorporation; which said act is dated the eighteenth day of June in the year of our Lord one thousand seven hundred and ninety-nine.*”

WILLIAM PRESCOTT,
LEVERETT SALTONSTALL.”

[By the act incorporating the defendants, it was provided that the persons therein named, and their associates, successors and assigns, should be created and made a corporation, by the name of, &c., and should “so continue from the first day of July 1799 until the expiration of twenty years next following.”

By an act passed on the 19th of June 1819, it is enacted, “that all bodies corporate and politic, which now are, or hereafter may be established, and whose powers would expire, either by express limitation in their charters of incorporation, or otherwise, shall be, and they hereby are continued bodies corporate and politic, for the term of three years, from and after the day on which their powers would expire, as aforesaid, for the purposes of prosecuting and defending all suits, which now are, or may hereafter be instituted, and of enabling such bodies corporate and politic gradually to settle and close their concerns, and divide their capital stock; but not for the purpose of continuing the business, for which such bodies corporate and politic have been, or may be established.”]

¹ Portions of the arguments are omitted. — Ed.

The question arising out of the above suggestion was argued at *Boston*, March term 1820, (the action having been continued *nisi* for argument and judgment) by *Prescott* and *Saltonstall* for the defendants, and *Pickering* and *Webster* for the plaintiffs.

Webster, for plaintiffs. To determine whether this act *impairs any rights* of the parties, it is necessary to ascertain what those rights were independently of the act in question. The plaintiffs must be taken to be creditors of the corporation. They have a claim, with all *primâ facie* evidence in its favour; and are therefore creditors as far as they can be before judgment. As creditors they have a right to payment out of the funds of the corporation. If the corporation should dissolve, leaving their demand unsatisfied, there can be no doubt that they would still have a right in equity, to follow the fund, and charge their debt upon it in the hands of those who should have possession of it.

The plaintiffs thus having a right to be paid out of the corporate property, and the persons who have obtained possession of this property having no right to withhold it from them, what *right* is violated by this law? It was obviously intended to *enforce* rights, not to *violate* them. It gives a remedy, new indeed, but reasonable and practicable, for a manifest existing right. It neither increases the debt, nor varies the contract between the parties. It merely holds the corporation answerable for its obligations, until it fulfils them; and gives a new remedy to enforce their fulfilment. It is intended to enable the plaintiffs, and others in similar circumstances, to recover their money. Have they not a right to it?—It is intended to compel those who hold the funds to pay the debts. Ought they not to be thus compelled? It is therefore a law giving a new remedy for an existing right: against which there can be no objection.

The statute is general, and governs other cases as well as the plaintiffs'. If it were a private act, applicable to a particular case only, it might be thought a more questionable exercise of legislative power: because the true notion of *law* is, that it is a general and permanent rule of conduct. It has been the practice of the legislature of this Commonwealth, for many years, to create corporations for a great variety of purposes, for limited periods. Many of these corporations are about expiring: and the single question, as far as the present case is concerned, is, whether the legislature may not, before they expire, provide a mode, in which their concerns may be settled, (equally for the benefit of themselves and others) by the collection and payment of their debts.

There could be no objection to a provision by law, for the appointment of an administrator, *eo nomine*, of the effects of an expired corporation: or for making the president, or the president and directors last in office, trustees to collect and pay debts, for the benefit of all concerned. Instead of either of these modes, the legislature has enacted that the corporate existence shall continue, so far only as shall be

necessary to accomplish these purposes. It has in effect declared, that there shall still be a president and directors, with powers only to administer the remaining funds, and to collect and pay the debts, which were of the corporation.

It is not easy to conceive what contract this *violates*. The government has never stipulated that this corporation should have, at any time, an exemption from its debts. There is no contract, in its charter or elsewhere, that if it expires leaving debts unpaid, the funds shall not be followed for the benefit of creditors, in any mode or form of remedy which the law may prescribe.

All the cases cited by the counsel for the defendants are such, in which some vested right has been affected, or some new contract made, or attempted to be made, between the parties. The general principle of those cases is, most unquestionably, a sound one; and of great importance to be observed. But a distinction must be made between acts, which affect existing rights, or impose new obligations, — and acts, which give new remedies for existing rights, and enforce the performance of previous obligations.

(This statute is as strictly remedial, as the late statute giving further relief in equity: and yet no one doubts the propriety of applying the provisions of that statute, as a remedy to enforce the performance of contracts previously made. Perhaps it might have afforded a remedy in this case; but it would be liable to all the objections, which have been urged against the present act; the whole amount of which objections is no more, than that a new remedy is given by law, to enforce existing contracts.

This statute is not retrospective, in any just sense of that term. A retrospective law has been defined to be a law, which takes away or impairs vested rights. But if it be the object and operation of this law, to confirm and enforce rights, and to provide adequate and suitable remedies for the violation of them, it cannot be within the definition.

The cases, which have been cited for the defendants, are not like this. In the *Dartmouth College* case, the legislature of *New Hampshire*, by a special act, undertook to abolish, in effect, a private corporation, and to give its property to others. The corporators were deprived of their own property, without forfeiture, without trial, without even the imputation of a fault. *Fletcher vs. Peck* was a case, in which the legislature of a state undertook to resume its own grant, and that after third persons had obtained an interest in the land granted. In the case of *King vs. Dedham Bank*, this court held that an act of the legislature could not have the effect of altering a private contract, subsisting and unbroken between the parties at the passage of the law, by varying the terms, or imposing new duties on either party, in regard to the sum to be paid, or the place or time of payment. Or in other words, it could not *enact* that the parties had made a contract, which they never had made. The present case is like none of these. It is

but a general provision, giving new remedies prospectively, for cases in which corporations might expire by the limitation of their charters, leaving their affairs unsettled.

It is of no importance, whether the inducement of the legislature to pass the law grew out of an expected difficulty in regard to this particular corporation or not. Inconvenience, felt or apprehended, is the ordinary occasion of legislation. The statute is general; and its provisions seem to be beneficial to all parties, and to be within the proper exercise of legislative power.

PARKER, C. J. The question arising from the suggestion filed in this action, at the last term in *Essex*, is, whether the statute of 1819, c. 43, has the force of law with regard to this corporation; so that it is still in existence, for the purpose of suing and being sued, and for other purposes mentioned in the act.

Acts of a legislature, constitutionally organized, are to be presumed constitutional; and it is only when they manifestly infringe some of the provisions of the constitution, or violate the rights of the subject, that their operation and effect can be impeded by the judicial power. Whenever this shall happen; as it may from inadvertence, or in times of political conflict, when the passions domineer over reason; it is the duty of every court to protect those rights, and to vindicate the constitution.

Thus, if the legislature were to enact, that *A. B.* was guilty of treason, and that he should suffer the penalty of death; it would be the sworn duty of the court, or of any member of it, to grant a *habeas corpus*, and discharge him. — Or if they should enact, that his estate should be confiscated, or transferred, or taken for the use of the publick without an equivalent, such acts would not be laws; and they never could be executed, but by a court as corrupt, or as passionate, as the legislature which should have passed them.

So, if the legislature should attempt to destroy or impair the legal force of contracts, by declaring that those who were indebted should be discharged without paying their debts, or on paying a less sum than they owed, or in something different from what was agreed: such acts would be unconstitutional, although not expressly prohibited; because by the fundamental principles of legislation, the law or rule must operate prospectively only; unless in cases where the publick safety and convenience require that errors and mistakes should be overruled: the power to do which has been immemorially exercised, and we believe, within the constitutional power of the legislature. For it is doing no one wrong, to prevent his taking advantage of a mere error or mistake.

Now if the act in question impairs the force and obligation of contracts, or injures private property, or disturbs any vested rights; we ought to declare it void, and we should be ready to do so. But we are to be satisfied that it has this character.

In the first place, we see no pretence for saying that it impairs the force of contracts. Certainly it has not that effect on contracts made by or with the bank: but the very object of the statute is to enforce such contracts.

It is said, however, that the contract with the government was, that at the end of twenty years the corporation should be dissolved, and each member take his share out of the common fund. But it should be considered that, by the original charter, each member's share was liable for all the debts of the bank; and that he would have no moral right to withdraw it, until all the debts of the bank were paid: so that there was an equitable lien upon his share; and the legislature, we think, had a right, if it was not their duty, to provide the means of enforcing this moral obligation.

The law complained of is a general law, operating upon all bodies corporate; and it is convenient for them and the publick, that their power of suing and being sued should be continued beyond the period, within which they are empowered to make contracts; in order that their concerns may be properly adjusted.

Nor do we think it an objection, that this additional term should be granted by an act made subsequent to the time when their charter was granted. A debtor to the bank could not object to a suit, on the ground that the original term of the charter had expired: for the very bringing of the suit would be an acceptance of the prolongation of the charter; and it would be absurd for him to say, that his debt was discharged, or that there were no means of recovering it, because he contracted with the corporation on a supposition that it would continue in being only a certain number of years. We think it equally incompetent for such corporation to deny its existence, against a statute of the government, the object of which is to give a right of action on contracts, upon which they were legally and morally bound under their charter.

It is said that the members of such a corporation associated upon the faith that, after the time limited in their charter, they might separate, and take their shares of the stock. — But it is to be answered that their stock is, in an equitable view, pledged for the payment of all debts due from the corporation; and that it would be fraudulent to withdraw the funds, knowing that there were debts to be paid; leaving no means of coercing the payment of those debts. What should be said of a banking company, which, just before its expiration, should divide all the stock, making no provision for the payment of its debts? Yet this might be done, if the legislature have no authority to establish, by law, a mode by which it should be compelled to fulfil its obligations. For it is certainly doubtful whether any means exist, under our laws, of pursuing the funds into the hands of individual corporators, and subjecting them to the claims of creditors. We see no violation of the rights of the corporators, no impairing of the obligation of contracts: for it can never be the right of any person to withhold a just debt from his creditor.

Upon the whole, we cannot discern any principle, by which it can be decided that this statute is void. It is not retrospective, in the proper sense of that term: for it provides for a future existence of the corporation, for limited and specifick purposes. It does not infringe, or interfere with any of the privileges secured by the charter: unless it be considered a privilege to be secured from the payment of debts, or the performance of contracts; and this is a kind of privilege, which we imagine the constitution was not intended to protect. It does not impair the force or obligation of contracts; but on the contrary, provides a way of enforcing them, both in favour of, and against the corporation.

Many statutes have been referred to in the argument, which are much more questionable, as to their constitutionality, than the one under consideration: — The statutes of limitation, operating upon contracts already in force: — The suspension of those statutes, after the debtor may have considered that he had a right to be discharged within a certain period: — The statutes made for curing defects in the proceedings of courts, towns, officers, &c., when the party to be affected might be said to have a vested right to take advantage of the error. The truth is, there is no such thing, as a vested right to do wrong: and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.

It was an incumbent duty of the legislature, to provide that corporations should not avoid their obligations, by ceasing to exist: and the mode, adopted in the act in question, was certainly the most favourable. Had they provided that all corporations should cease to transact business, three years before the time, for which they were created, expired, in order that they might bring their affairs to a close; it might justly be said, that their privileges were taken away, and the grant of the government was impaired. But to provide for their continuance for such purpose, three years beyond their term, is no breach of their privileges; and is, in fact, nothing more than establishing a mode, by which their business may be closed, and their contracts carried into execution. It is in the nature of an administration upon their estate, and is only doing, in a more convenient form, what a court of equity, with competent powers, might do; *viz.*, making the common fund answerable for the debts, which were created on the credit of that fund.

The suggestion filed in the case cannot have the effect to impede the progress of the suit.

MUMMA v. POTOMAC CO.

1834. 8 *Peters*, 281.¹

STORY, J. This is a writ of error to the circuit court of the District of Columbia, for the county of Washington. The case presented on the record is shortly this :—

The plaintiff in error, Mumma, in June, 1818, recovered a judgment against the Potomac Company, for the sum of \$5,000. No steps were taken to enforce the payment of the judgment, nor any further proceedings had in relation thereto, until the 18th day of April, 1828, on which day a writ of *scire facias* was issued from the clerk's office of said court, against the said Potomac Company, to revive said judgment, which case was continued, by consent of parties, from term to term, until December term of said court, in the year 1830, at which term the following plea and statement were filed by consent of parties :—“The attorneys upon the record of the said defendants now here suggest and show to the court that, since the rendition and record of said judgment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the States of Maryland and Virginia, and by the congress of the United States,² have duly signified their assent to said charter, &c., and have duly surrendered their charter, and conveyed in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights, and privileges by them owned, possessed, and enjoyed under the same, which surrender and transfer from said Potomac Company have been duly accepted by the Chesapeake and Ohio Canal Company, as appears by the corporate acts and proceedings of said company, and final deed of surrender from the said Potomac Company, dated on the 15th day of August, 1828, duly executed and recorded in the several counties of the States of Virginia and Maryland and the District of Columbia, wherein said Potomac Company held any lands, and wherein the canals and works of said company were situated; which said corporate acts and proceedings the said attorneys here bring into court, &c., whereby, the said attorneys say, the charter of the said Potomac Company became and is vacated and annulled, and the company and the corporate franchises of the same are extinct,” &c.

Whereupon, the following statement and agreement were entered into and signed by the counsel for both parties, and made a part of the record.

“The truth of the above suggestion is admitted, and it is agreed to be submitted to the court whether, under such circumstances, any

¹ Statement and arguments omitted. — Ed.

² 4 Stats. at Large, 101.

judgment can be rendered against the Potomac Company upon this *scire facias*, reviving the judgment in said writ mentioned, and that reference for the said corporate acts and proceedings, and the deed in the above suggestion mentioned, be had to the printed collection of acts, &c., &c., printed and published by authority of the president and directors of the Chesapeake and Ohio Canal Company in 1828."

Upon this statement and agreement the circuit court gave judgment that the plaintiff take nothing by his writ, and the question now is whether this judgment is warranted by law.

Two points have been made at the bar. 1. That the corporate existence of the Potomac Company was not so totally destroyed by the operation of the deed of surrender as to defeat the rights and remedies of the creditors of the company. 2. That the deed of surrender violates the obligation of the contracts of the company, and that the legislative acts of Virginia and Maryland, though confirmed by the congress of the United States, are on this account void, and can have no legal effect.

We think that the agreement of the parties completely covers the first point, and precludes any examination of it. That agreement admits the truth of the suggestions in the plea of the attorneys for the Potomac Company; and by that it is averred that the charter of the Potomac Company was duly surrendered to the Chesapeake and Ohio Canal Company, and was duly accepted by the latter; and that thereby the charter of the Potomac Company became and is vacated and annulled. And if we were at liberty to consider the last averment, not as an averment of a fact, but of a conclusion of law, the same result would follow; for the 13th section of the act of Virginia of January, 1824, incorporating the Chesapeake and Ohio Canal Company, declares that, upon such surrender and acceptance, "the charter of the Potomac Company shall be, and the same is hereby vacated and annulled, and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated."

Unless, then, the second point can be maintained, there is an end of the cause; for there is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, (even supposing the act of confirmation of congress out of the way,) cannot in any just sense be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bonâ fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted

by the local laws. Besides, the 12th section of the act incorporating the Chesapeake and Ohio Canal Company makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do) to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors at that time may bear to the whole debt of \$175,800, (the supposed aggregate amount of the debts of the Potomac Company.) So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues in the only mode in which it could be practically done upon its dissolution, a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independent of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter.

Without going more at large into the subject, we are of opinion that the judgment of the circuit court ought to be affirmed. But as there is no such corporation *in esse* as the Potomac Company, there can be no costs awarded to it.

STATE v. COMMERCIAL STATE BANK.

1890. 28 *Nebraska*, 677.¹

ORIGINAL application by the Attorney General, under the provisions of Section 14, Chapter 37, Laws of 1889, for the appointment of a receiver to take charge of, and wind up the business of, the Commercial State Bank. The defendants are the Bank, McConaughy, its president, and Shreck, sheriff of York County. The petition alleges, *inter alia*, that certain persons are creditors of the Bank.

¹ Part of opinion omitted. — ED.

Shreck demurred to the petition.

William Leese, Attorney General, and *W. T. Scott*, for State.

Sedgwick & Power, contra.

NORVAL, J. [After stating the petition and the statute, and holding that the court has jurisdiction of the case.]

The petition contains all the facts required by the banking law and is sufficient to authorize the appointment of a receiver to take charge of and wind up the affairs of the defendant bank.

It appears from the allegations of the petition that the defendant McCaughy has made an assignment for the benefit of his creditors, and that the defendant sheriff, as such assignee, has taken possession of all of the estate of said McCaughy, by the direction of the officers of the defendant bank, who claimed that the defendant McCaughy is the sole owner thereof. This brings us to the principal question we are called upon to decide in this case, and that is, whether the property and assets of a banking corporation organized under the laws of this state, after it has ceased to do business, should be applied in payment of its debts, and whether this right is superior to those of a stockholder of the bank, or the assignee of a stockholder. The defendant bank is an artificial person, having its own property, assets, and liabilities. Credit was given to the corporation; its assets should be applied where the credit was given, and not be taken in payment of the individual debts of one of the stockholders.

It has been repeatedly held by this court, and we think correctly, that the property of an insolvent trading partnership should be applied first in payment of the firm debts. The same rule should be applied in winding up the business of the defendant bank. The property and assets are a trust fund for the payment of its debts and cannot lawfully be diverted. The rights of the creditors to the assets are superior to those of the stockholders or the creditors of a stockholder. Mr. Perry, in his work on trusts, states the rule thus: "A corporation holds its property in trust: first, to pay its creditors, and, second, to distribute to its stockholders *pro rata*. If, therefore, a corporation should dissolve and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom its property had come, into trustees, and would compel them to account for the property, and contribute to the payment of the debts of the corporation, to the extent of its property in their hands." (Perry on Trusts, sec. 242.) This doctrine has been established by the adjudicated cases. In *Upton v. Tribilcock*, 91 U. S., 45, it is stated that "the capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by

the courts." The following authorities sustain the same position: *Taylor v. Miami Exporting Co.*, 5 Ohio, 165; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St., 182; *Sanger v. Upton*, 91 U. S. 56.

It appears from the allegations of the petition that the assignee of McConaughy has, by direction of the officers of the bank, taken possession of all its property. This action on the part of the officers conferred no rights upon the assignee. It being established that the assets of the bank are a trust fund for all its creditors, it follows that the officers of the corporation were trustees for all the creditors and could not lawfully turn over the same to the assignee. The receiver heretofore appointed by this court is entitled to all of the property of the bank.

The demurrer to the petition is overruled.

Judgment accordingly.

The other judges concur.

BACON v. ROBERTSON.

1855. 18 *Howard* (U. S.), 480.¹

APPEAL from the U. S. Circuit Court for the Southern District of Mississippi.

Bill in equity, by stockholders in the late Commercial Bank of Natchez, against Robertson, appointed by the State Court a trustee to wind up the affairs of the bank, whose charter had been judicially declared forfeited. The statutes of the State authorized the appointment of a trustee in such cases; and provided that after the payment of debts, "the surplus, if any, shall be ratably distributed among the stockholders." The bill alleges that all debts have been paid, and that property of great value remains with the trustee, who refuses to account for it to the stockholders. The object of the bill is to establish the title of the stockholders to this surplus, and to obtain the ratable shares of such of them as are able and willing to join as plaintiffs in this suit.

A demurrer was filed.

The Circuit Court rendered a decree dismissing the bill. Plaintiffs appealed.

Wharton and *Yerger*, for appellants.

Lawrence, for appellees.

CAMPBELL, J.

The tendency of the discussions and judgments of the court of chancery in Great Britain, and of the courts of this country, is to concede the existence of a distinct and positive right of property in

¹ Statement abridged. Only part of the opinion is given.—ED.

the individuals composing the corporation, in its capital and business, which is subject in the main to the management and control of the corporation itself; but that cases may arise where the corporators may assert not only their own rights, but the rights of the corporate body. And no reason can be given why the dissolution of a corporation, whether by judicial sentence or otherwise, whose capital was contributed by shareholders, for a lawful and perhaps laudable enterprise, with the consent of the legislature, should suspend the operation of these principles, or hinder the effective interference of the court of chancery for the preservation of individual rights of property in such a case. The withdrawal of the charter — that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals — is such a substantial impediment to the prosecution of the rights of the parties interested, whether creditors or debtors, as would authorize equitable interposition in their behalf, within the doctrine of chancery precedents. *Stainton v. The Carron Company*, 23 L. and E. 315; *Travis v. Milne*, 9 Hare, 141; 2 Ib. 491. For the sentence of forfeiture does not attain the rights of property of the corporators or corporation, for then the State would appropriate it. If those rights are put an end to, it would seem to be rather from a careless disregard, or hardened and reckless indifference to consequences, on the part of the public authority, than from any preconceived plan or purpose. For, according to the doctrine of the text writers on this subject, the consequences are visited without any discrimination; the losses are imposed upon those who are not blameworthy, and the benefits are accumulated upon those who are without desert. The effects of a dissolution of a corporation are usually described to be, the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporate body, so that they are not a charge nor a benefit to the members. The instances which support the *dictum* in reference to the lands, consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members; or of donations to public bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale, for a full consideration, and without conditions in the deed; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion, where the succession fails. If the statement of the consequences of a dissolution upon the debts and credits of the corporation is literally taken, there can be no objection to it. The members cannot recover nor be charged with them, in their natural capacities in a court of law. But this does not solve the difficulty. The question is, has the *bona fide* and just creditor of a corporation,

dissolved under a judicial sentence for a breach in its charter, any claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the act of the legislature which directed the prosecution? Can the lands be resumed in disregard of their rights by vendors, who have received a full payment of their price, and executed an absolute conveyance? Can the careless, improvident, or faithless debtor, plead the extinction of his debt, or of the creditor's claim, and thus receive protection in his delinquency? The creditor is blameless—he has not participated in the corporate mismanagement, nor procured the judicial sentence; he has trusted upon visible property acquired by the corporation, in virtue of its legislative sanction. How can the vendors of the lands or the delinquent debtors resist the might of his equity? But, if the claims of the creditor are irresistible, those of the stockholder are not inferior, at least against the parties who claim to hold the corporate property. The money, evidences of debt, lands, and personalty acquired by the corporation, were purchased with the capital they lawfully contributed to a legitimate enterprise, conducted under the legislative authority. The enterprise has failed under circumstances, it may well be, which entitle the State to withdraw its special support and encouragement; but the State does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen. It is a case, therefore, in which courts of chancery, upon their well-settled principles, would aid the parties to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it.

In our view of the equity of this bill we have the support and sanction of the legislature of Mississippi. Their legislation excludes all the consequences which have been imputed as necessary to a sentence of dissolution on a civil corporation. From the plenitude of their powers, for the amelioration of the condition of the body politic, and the supply of defects in their system of remedial laws, they have afforded a plan for the liquidation and settlement of the business of these corporations in which the equities of the creditors and shareholders respectively are recognized, as attaching to all the corporate property of whatever description. And the inquiry arises, who is authorized to obstruct the enforcement of these equities, in so far as the stockholders of the Commercial Bank of Natchez are concerned? The creditors have been satisfied. The defendant in the present suit is the trustee appointed under these legislative enactments. His demurrer confesses that he has received money, stocks, evidences of debt, lands, and personal property, which he refuses to distribute. He claims that the stockholders have no rights since the dissolution of the corporation, and if any, they must be looked for in the circuit court of Adams county, Mississippi. But the trustee cannot deny the title of the stockholders to a distribution. To collect and distribute the property of the corporation among the creditors and stockholders, is his commission—for this end he was placed in the possession of the property, and was armed with all the powers he has exercised.

His title is in subordination to theirs, and his duties are to maintain their rights and to consult their advantage. *Pearson v. Lindley*, 2 Ju. 758; 3 Pet. 43; 4 Bligh, 1; *Willis Trus.* 125, 172, 173. He is estopped from making the defence of a want of title in the stockholders. Nor is the objection to the jurisdiction of this court tenable. Ten years have nearly elapsed since this trust was created. The acts of the legislature contemplated a prompt and speedy settlement. They direct the reduction of all the property into ready money, and an early distribution among the parties concerned. The trustee confesses that he has not sold the lands nor personal estate, and that he has refused to distribute the money. He has committed a palpable breach of trust, according to the case made by the bill and as confessed by the demurrer. All the other trusts having been fulfilled, the stockholders are entitled to such an administration as will be most beneficial to them, or to a sale of the trust property in the manner prescribed by the statute of Mississippi. Nor is the objection to the form of the suit tenable. If the trust estate had been liquidated and the interests of the stockholders ascertained, any stockholder might have maintained a suit for his aliquot share without including any other stockholder. *Smith v. Snow*, 3 Mad. C. R. 310. But the trust estate has not been sold, nor are the names of all the stockholders ascertained, the trustee is called on to account, and the bill asks for the collection and disposal of the remaining property under the authority of the court of chancery.

The stockholders are interested in these questions, and are then proper parties to the bill. The number of the parties renders it impracticable to bring all before the court, and therefore the suit may be prosecuted in the form which has been employed in this suit. This court sustained such a bill in the case of *Smith v. Swormstedt*, 16 How. 288.

We do not intend to decide any of the questions of the cause which may arise as to the mode of administering the relief prayed for in this bill. Our opinion is that the plaintiffs have shown a proper case for equitable interposition by the circuit court, and that the decree of that court dismissing the bill is erroneous.

Decree reversed, and cause remanded.

CHAPTER XVII.

LEGISLATIVE CONTROL.

SECTION I.

How far Repeal, Change of Charter, or Confiscation, is prohibited by the U. S. Constitution, or by State Constitutions.

THE TRUSTEES OF DARTMOUTH COLLEGE
v. WOODWARD.

1817. (*In the State Court*), 1 *New Hampshire*, 111; also 65 *New Hampshire*, 473.

1819. (*In the U. S. Court*), 4 *Wheaton*, 518.

1817, 1819. (*In both Courts*), *Farrar's Report*.¹

THIS was an action of trover in the Superior Court of New Hampshire, by the trustees of Dartmouth College against William H. Woodward, for the College records, the original charter, the common seal, and divers books of account. Woodward was the secretary and treasurer of the trustees of Dartmouth *University*. His right to the property depended on the validity of certain Acts of the Legislature of New Hampshire purporting to amend the charter of Dartmouth College and to change its name to Dartmouth University.

¹ The decision in the State Court was reported, without the arguments of counsel, in 1 N. H. 111. The case was again reported in 65 N. H. 473 (published in 1891). The latter volume contains the arguments, and states that the case was again reported in order to preserve these arguments and render them accessible.

The decision in the U. S. Supreme Court, on a writ of error to the State Court, was reported, in the regular series, in 4 *Wheaton*, 518.

In addition to the above official publications, the arguments and decisions in both Courts are fully reported in a volume, published in 1819, edited by Timothy Farrar, and entitled: "Report of the Case of the Trustees of Dartmouth College against William H. Woodward," etc.

The statement of the case in the present volume of *Select Cases on Corporations* has been abridged from the statements and recitals in 1 N. H. 111, and 4 *Wheaton*, 518 (including statements found in the opinions of both Courts). The original charter and the various acts of the N. H. Legislature are given in full in the special verdict recited in 4 *Wheaton*, p. 519 to p. 551.

In the present publication none of the arguments are given, except a portion of the argument of Mr. Mason in the State Court.

In the Superior Court of New Hampshire the facts were agreed upon by the parties, and were afterwards put in the form of a special verdict.

The material facts were as follows : —

Prior to the chartering of Dartmouth College, Rev. Dr. Eleazer Wheelock had founded at his own expense, on his estate in Connecticut, a charity school for Indians, and had maintained it by contributions given at his solicitation. Contributions had been made and were then being solicited in England for this purpose, and funds thus given were in the hands of trustees in England, appointed by Dr. Wheelock to act in his behalf. Dr. Wheelock had made his own will, devising the existing charitable funds in trust to continue the school, and appointing trustees in America for that purpose. The proprietors of lands in the western part of New Hampshire promised to give large tracts, provided the school should be located in their section, and its benefits extended so as to include English youth as well as Indians. Dr. Wheelock, before removing the school, applied to the Crown for a charter; and the King, in 1769, granted the charter of Dartmouth College.

The charter recites, in substance, the facts above stated; ordains that there be a college erected in New Hampshire by the name of Dartmouth College, for the education of Indian and English youth; and that there shall be in said College “from henceforth and forever” a body corporate and politic, consisting of trustees of said College (“the whole number of said trustees consisting, and hereafter forever to consist, of twelve and no more”). The charter expresses the intent that the corporation shall have “perpetual succession and continuance forever.” The charter appoints Dr. Wheelock and eleven other persons as trustees. From the recitals in the preamble it is to be presumed that not less than six of the eleven were the same persons who had already been named as trustees by Dr. Wheelock in his will. Seven trustees constitute a quorum. The board of trustees fill vacancies in their own number. The usual corporate privileges and powers are conferred upon the trustees and “their successors forever.” The charter styles Dr. Wheelock “the Founder of said College,” and appoints him president.

It did not appear, and was not claimed, that the Crown or the Province made any donations, or proffered any endowment, prior to, or simultaneously with, the grant of the charter. The funds turned over to the College upon incorporation consisted entirely of the private gifts contributed by Dr. Wheelock and by other persons at his request. Lands were given to the College by Vermont in 1785 (sixteen years after the incorporation), and by New Hampshire in 1789 and 1807.

June 27, 1816, the Legislature of New Hampshire passed “An Act to amend the charter and improve the corporation of Dartmouth College.” The preamble styles Dartmouth “the college of this State.” By this Act and two later Acts of the same year, the following changes were made in regard to the College : —

1. The name is changed to "The Trustees of Dartmouth University."
 2. The number of trustees is increased from twelve to twenty-one, of whom nine shall constitute a quorum. The nine new trustees are to be appointed by the Governor and Council.

3. The trustees shall have power to organize colleges in the university; also to establish an institute, and elect fellows and members thereof.

4. A board of overseers, twenty-five in number, is created; the members [except four *ex-officio* members] to be appointed by the Governor and Council. The overseers are to have power to disapprove and negative votes of the trustees relative to the appointment and removal of president, professors, and other officers; relative to salaries; and also relative to the establishment of colleges and professorships, and the erection of new college buildings.

5. Each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

The trustees of Dartmouth College refused to accept, or act under, the Acts of 1816.¹

The defendant Woodward was appointed treasurer and secretary of the trustees of Dartmouth University, at a meeting composed of two of the former trustees of Dartmouth College and the nine new trustees of Dartmouth University appointed by the Governor.

The cause was argued at May Term, 1817, in Grafton County, by *Mason* and *Smith*, for plaintiffs; and by *Sullivan*, attorney general, for defendant. It was continued *nisi* for further argument in Rockingham County. At September Term, 1817, in Rockingham County, the case was again argued by *Mason*, *Smith*, and *Webster*, for plaintiffs; and by *Sullivan*, attorney general, and *Bartlett*, for defendant.

Mason, for plaintiffs.

By the charter of 1769 a corporation is created, by the name of "The Trustees of Dartmouth College." The charter recites, that much expense and great labour had been bestowed, in erecting and supporting a charity school, which had become highly useful; and that individuals, as well in England as in this country, were disposed to make donations, for its enlargement, and more liberal endowment; and that the king, "willing to encourage the laudable and charitable design," established the corporation. Twelve persons are appointed under the name of *trustees*, to constitute the corporation, and it is expressly provided, that it shall forever thereafter consist of twelve

¹ Nine of the old board declined to accept or act under the new statutes. It was, in 1815-1816, matter of common knowledge that there was a division in the board of trustees. In 1815 the board, by a vote of eight to four, removed Rev. Dr. John Wheelock, the son of the founder, from the presidency. The general belief was that the nine new trustees, appointed by the Governor under the Act of 1816, would side with the friends of Dr. Wheelock, thus converting the minority of the old board of twelve into a majority of the new board of twenty-one. — Ed.

trustees, and no more. To them is granted the right to acquire and hold real and personal estate, and to dispose of the same for the use of the college; and to appoint future trustees to fill vacancies in their board; and also to appoint the necessary officers of the college, and to assign them their duties and salaries; and to make laws and regulations for the proper government of the institution, together with all the usual powers of such corporations. “*To have and hold all and singular the privileges, advantages, liberties and immunities, and all other the premises, herein and hereby, granted and given, or which are meant, mentioned, or intended to be given and granted unto them, the said trustees of Dartmouth College, and their successors forever.*”

The first act (of 27th of June 1816) makes the twelve trustees, under the charter, and nine individuals, to be appointed by the Governour and Council, a corporation, by the name of “the trustees of Dartmouth University;” and transfers to them all “*the property, rights, powers, liberties and privileges*” of the old corporation, with power to establish *new colleges* and *an Institute*;—subject to the controul of a board, of twenty-five overseers, to be appointed by the Governour and Council.

The second act makes provision for obviating certain difficulties, which had occurred in attempting to execute the first. And the last act authorizes the defendant, who was the Plaintiffs’ treasurer, to retain and hold for a certain time, all their property against their will; and subjects them to heavy penalties, should they impede or hinder the execution of the acts.

Under colour of these acts, the defendant claims to hold the property mentioned in the declaration.

The question is whether the acts are obligatory and binding on the plaintiffs; they never having accepted or assented to them.

By the necessary construction of these acts, the old corporation is abolished, if they are valid; and a new one established. The first act does, in fact, create a new corporation; and transfers to it all the property and privileges of the old. The old corporation can, in no sense, be said to continue, when its property and privileges, of every kind, are thus taken away, and transferred to another corporation. The trustees and overseers of Dartmouth University constitute a corporation, if the acts are effectual for any purpose; and that corporation is, essentially, different, from the corporation of the trustees of Dartmouth College, as established by the charter.

The two corporations are different in their corporate names; in the natural persons that compose them; in the form and manner of their organizations; and in their rights and privileges. The old corporation consists of twelve trustees; the new of twenty one trustees and twenty five overseers. In the old corporation the trustees, by filling vacancies, as they happened, appointed their own successors, and enjoyed and exercised all the privileges, granted by their charter, and were subject to no controul, but that of the law of the land. In the new corpora-

tion, the trustees, in their most important acts and doings, are subject to the controul of a board of overseers, dependent for their appointments on the Governour and Council. Subject to this controul, the new trustees have all the rights and powers of the old ; and they have also other most important rights and powers, which the old trustees never had, nor claimed. Of course, new duties are incurred, correspondent to the newly granted rights.

In the first act it is provided, that " they (i. e. the new trustees) and their successors, in that capacity, *as hereby constituted*, shall respectively forever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities, *which have hitherto* been possessed, enjoyed and used by the trustees of Dartmouth College ; — *except so far as the same may be varied or limited by the provisions of this act*. And they shall have power (among other things) to organize colleges in the University ; to establish an Institute, and elect fellows and members thereof ; — and to arrange, invest and employ the funds of the University." What other or more appropriate language could have been used, if the old trustees had surrendered their charter, and the legislature had intended to establish a new institution, to supply the place, and enjoy all the property and privileges of the old corporation ? In an act for that purpose, terms could not have been used more significant and appropriate, than those contained in this act. They are in substance, that the corporation, *as hereby established*, shall have and enjoy all the property and rights, *which have hitherto* been held and enjoyed by the old corporation ; — except so far as the same may be varied or limited by this act.

It is true, the act purports to include the old trustees, in the new corporation, but they have not accepted the act, nor consented to become members of the new corporation, and consequently they are not members. For they can neither be compelled to become members of the new corporation, against their will ; nor to exercise new powers, or submit to new restrictions, in the old corporation. It was neither expected, nor desired that the old trustees should unite with the new ones. The intention doubtless was, in this indirect way to abolish the old corporation, and get rid of the trustees. The manner, in which the injury was inflicted, does not lessen the grievance.

But if it should be held, that the old corporation is not, absolutely, abolished, it could avail nothing, in support of the validity of the acts. For the legislature is no more competent to change, and essentially alter the rights of the plaintiffs, than to abolish them. And it cannot be denied, that the acts do, in many particulars, essentially, affect and alter both the corporate, and individual rights and powers of the old trustees. That alterations and new limitations are imposed is admitted, by the very terms of the first act. The new trustees are to enjoy and exercise all the property, and privileges, which had been enjoyed and exercised by the old trustees, — *except so far as the same may be varied or limited by the provisions of that act*.

Before the passing of the acts, the plaintiffs were sole owners of all the property, acquired under their charter, and were, alone, entitled to exercise all the privileges, granted by it. By the acts, others are admitted, against their will, to become joint owners with them, of the property, and to a joint participation, of all the privileges. This forcible intrusion, under pretence of joint ownership, violates the plaintiffs' rights, as essentially, as would an entire ouster.

The whole organization of the corporation is changed. — Instead of one board, consisting of twelve members, there are two boards, — one of twenty one members. — the other of twenty five. By the charter, the trustees had the right of making all suitable regulations, for the institution, subject to no appeal. By the acts, all the votes, and doings of the trustees may be negatived by the overseers; in whose appointment, the corporation has no agency.

Not only are new trustees forced in, to participate with the old ones, but new trusts, and new duties are created. — An Institute and new colleges are to be established, and the funds, acquired under the charter may be applied to their establishment and support.

The President of the College, a member of the old corporation, held his office and salary, dependent on the twelve trustees alone. The tenure of his office is changed, and he is now dependent on others, who have already attempted to remove him.

If the legislature can, at pleasure, make such alterations and changes, in the rights and privileges of the plaintiffs, it may take them away entirely. If a part may be destroyed or taken away by one act, the rest may, by another. The same power, that can do one, can do the other.

I shall contend for the plaintiffs that these acts are not obligatory :

I. Because they are not within the general scope of legislative power :

II. Because they violate certain provisions of the constitution of this State, restraining the legislative power :

III. Because they violate the constitution of the United States :

On the first point, the attempt will be to show, that the legislature would not have been competent to pass these acts, and make them binding on the plaintiffs, without their assent, even if there were no special restrictions on the power of the legislature, either in the constitution of this state, or of the United States.

Numerous instances have occurred, where it has been the duty of the courts of law, in this state, as well as in most other states of the union, to examine into the legality of the doings of their respective legislatures. And the cases, in which the courts have been obliged to declare legislative acts unconstitutional and void, are vastly more numerous, than judging from the theory of our governments, was to have been expected. As the constitutions attempt to define, with exactness, the powers granted to each department of government, it might have been expected, had not experience shown the contrary, that each department would have carefully confined itself, within its prescribed limits.

The celebrated maxim that the legislative, executive, and judicial powers of government ought to be kept separate and distinct, and be vested in different departments, was well understood and duly appreciated, at the time of forming the constitution of this state; and is recognized and adopted in the 37th article of the bill of rights. The due observance of this principle, according to the opinion of the most celebrated statesmen, and political writers, is essential to the preservation of a free government. "There can be no liberty, where the legislative and executive powers are united in the same person, or body of magistracy:" or, "if the power of judging be not separated from the legislative and executive powers."¹ Mr. Madison, speaking of this principle, says, "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."²

In compliance with this fundamental principle of all free governments, our constitution has erected the three departments, and given to each its proper powers.

The chief labour and difficulty has always been, to keep the legislative power, within its limits: and to protect the other departments from its encroachments. The legislature is too numerous to be restrained by considerations of individual responsibility. Confident in its influence with the people, it acts with a boldness and intrepidity, of which the other departments are incapable. This is the united opinion of the most able judges, after a critical examination of the course and tendency of our governments. "The legislative department is every where, extending the sphere of its activity, and drawing all power into its impetuous vortex." "It is against the enterprising ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions."³ Mr. Hamilton on the same subject says, "we have seen, that the tendency of republican governments is to an aggrandizement of the legislative, at the expense of the other departments."⁴ "They (the legislature) have accordingly, in many instances, decided rights, which should have been left to judiciary controversy."⁵

Legislative bodies seem to consider themselves as representing, exclusively, the sovereignty of the people, and as having the right to exercise any power, that they may deem expedient, unless specially prohibited. It is often gravely contended, that the legislature, thus representing the people, is superior to the other branches of the government, and that it may, of right, exert a general controuling power over them. Such a doctrine is entirely inconsistent with that vital

¹ Montesq. Spirit of Laws, B. 11. C. 6. 1 Vol. 181.

² 47th No. of Federalist.

⁴ 49th No. of Federalist.

³ 48th No. of Federalist.

⁵ Jefferson's notes on Virginia, 195.

principle of all free governments, that the three great powers should be kept separate and independent.

This axiom requires, that each department should confine itself to the powers granted to it, and not interfere with, nor exercise those, granted to the other departments. No interference whatever ought to be permitted, except where there is, by the constitution, a plain delegation of power; as in the instance of the qualified negative, of the acts of the legislature, by the Governour. The different departments are co-ordinate, independent, and equally the depositaries of sovereign power. Each has what was delegated to it by the people, the great source of all power, and neither has more. Each of the three powers is, in its nature, sovereign, within its proper sphere of action. Within the limits, prescribed for it, the judiciary department is as substantially sovereign, as the legislative is within its limits. And the Courts of justice have as much right, to enact and promulgate new laws, as the legislature has to decide private controversies. For there is no more ground for a pretence, that power is given, by the constitution, either directly, or by inference, to the legislature to decide on matters of private right, than that power is given to the Courts, to enact general statutes. And one department, whenever it shall attempt to act, beyond the limits of its authority, is entitled to no more obedience or respect, than another would be, when making a similar attempt.

The Constitution of this State, and that of the United States, apparently jealous of the encroaching tendency of the legislative power, have not only defined it, with caution and exactness, but have also, in many instances, where from former experience, the greatest danger was apprehended, guarded it with special prohibitions. But these "parchment barriers" will have little effect, unless carefully guarded, and firmly defended by the judiciary. The powers are divided, and granted to separate and independent departments, to the end, that each may, in its turn, be checked and restrained, in any attempt to exercise powers not granted to it. To restrain the legislative department, from overleaping its boundary, the chief reliance is placed on the Judiciary.

That the Courts of law not only have the right, but are bound to entertain questions, and decide, on the constitutionality of acts of the legislature, though formerly doubted, seems to be now almost universally admitted. But an erroneous opinion still prevails, to a considerable extent, that the courts, in the discharge of this great and important duty, ought to act, not only with more than ordinary deliberation, but even with a degree of cautious timidity. The idea is, that these are dangerous subjects for Courts, and that they ought not to declare acts of the legislature unconstitutional, unless they come to their conclusion, with absolute certainty, like that of mathematical demonstration; and where the reasons are so manifest, that none can doubt. A Court of law, when examining the doings of a co-ordinate branch of the government, will always treat it with great decorum.

This is proper in itself, and necessary to preserve an harmonious understanding, between independent departments. So also, it ought to be, after the most careful deliberation only, that a proceeding of such co-ordinate branch should be pronounced void. Because the result is always important. But the examination is to be pursued with firmness, and the final decision, as in other cases, must be according to the unbiased dictate of the understanding.

An act of the legislature must, necessarily, have the sanction of the opinion of a majority of a numerous body of men. It cannot therefore be supposed, that the reasons, against the validity of such an act, will ordinarily be so plain and obvious, as to leave no manner of doubt. To require then, that Courts shall abstain from declaring acts of the legislature invalid, while a scruple of doubt remains, is nothing less, than to demand a surrender of their jurisdiction in this particular; in the due exercise of which consists the chief, if not only efficient security, for the great and fundamental principle of our free governments. Experience shows, that legislatures are in the constant habit of exerting their power to its utmost extent. They intentionally act up to the very verge of their authority; and are seldom restrained by doubts or timidity. If the Courts, fearing a conflict, adopt a course directly opposite, by abandoning their jurisdiction, and retiring, whenever a plausible ground of doubt can be suggested, the time cannot be distant, when the legislative department "will draw all power into its impetuous vortex."

The constitution of this State gives to the Legislature all legislative power, and no other, that has any relation to the matter, under consideration. If therefore the passing of the acts, in question, be not within the general scope of the legislative power, they cannot be valid.

The acts are predicated on no previous proceedings against the plaintiffs, showing any misconduct; but the attempt is, by a mere declaration of the sovereign will of the legislature, to take from the plaintiffs the whole, or a part, (and it makes no difference which) of their property and privileges; and to transfer them to others. That cannot be done by the exercise of the legislative power. That power is confined to the enacting of laws, and providing the proper ways and means for their execution, and finds there a sufficiently broad field of operation. Whenever a legislature rightfully performs other functions, it must be by virtue of special power, delegated for the purpose. A legislature can never, by virtue of its general legislative power interfere in questions of private right. A legislature within its proper sphere of action, is governed by its discretion alone; it can have no other guide. But private rights are not held by the uncertain tenure of arbitrary discretion. — "An elective despotism was not the government we fought for."¹

The security of private rights is the only valuable and important advantage, which a free government has over a despotick one. If the

¹ Jefferson's notes on Virginia, page 195.

rights of individuals must be liable to be violated by despotick power, it matters not, whether that power rests in the hands of one, or many. Numbers impose no restraint, and afford no security. Experience has shown, where all the powers of government have been united, that their being exercised by a numerous assembly, has afforded to private rights, no security against the grossest acts of violence and injustice.

The Legislature can make laws, by which private rights may become forfeited. But the Courts of justice are alone competent to adjudge and declare the forfeiture. While the legislative and judicial powers are kept separate, it can never be competent for the legislature, under any pretence whatever, to take property from one, and give it to another, or in any way infringe private rights. Were that permitted, all questions of private right might be speedily determined by legislative orders and decrees; and there would be no occasion for Courts of law.

The deciding on matters of private right appertains, plainly and manifestly, to the judiciary department. It constitutes the chief labour of Courts of justice. As then one department cannot exercise the powers belonging to another, it follows, that the legislature cannot, rightfully, assume any part of this jurisdiction, thus belonging to the judiciary department. The province of the legislature is to provide laws, and that of the Courts to decide rights, according to the laws. Were the Courts to assume the power of making the laws, by which they are to decide, their judgments would be arbitrary. Because, in making the laws, they could have no other rule than their own discretion. So when the legislature, whose right it is to make the law, assumes the power of adjudicating, the separate powers of government become united, and a despotism is created. And accordingly, it will be generally found, that where legislatures have attempted to interfere with private rights, they have decided with little or no regard to existing laws, but according to their own arbitrary discretion; or in other words, by the exercise of despotick power.

The general principle may be safely asserted, that no vested right whatever can be divested, and taken away from one, and transferred to another, by force of a legislative act, and without the agency of a Court of justice. This principle is clearly established, in the case of *Vanhorne vs. Dorsance*, 2 Dal. 304. A vested right is a right, acquired and possessed according to existing laws. Mr. Justice Ashurst calls it "a *legal right*, properly vested in a third person, or an interest *legally vested*."¹ All rights, legally acquired, are alike protected. The right to possess any peculiar privilege, or incorporeal hereditament, is entitled to the same protection, as the right of visible property. And it makes no difference, whether the property or privilege was obtained, by a grant from the State, or a private individual. The legislature cannot revoke its own grants. Thus land granted by a legislature becomes private property, and the grantee has immediately all the rights of ownership. And the agency of the legislature, in making

¹ *King vs. Amory*, 2 T. R. 569. — 3 Dal. 391.

the grant, gives it no authority to interfere with any rights, which the grantee derives from his grant.¹ So the grant by the legislature to an individual, of a particular privilege, gives a vested right to the enjoyment of that privilege. It has been decided by the Supreme Court of the United States, that a grant, from a State, of a privilege or immunity, that certain land should be free from taxation, confers a right on the owner, which the legislature cannot infringe.² Of the same nature are grants of the privileges of keeping public ferries, or erecting bridges and receiving certain tolls therefor, and also patents for new and useful inventions, all which create legal or vested rights, which cannot be taken away or infringed by the legislature.

If then legal rights, vested in individuals, cannot be taken away, or infringed by legislative acts, the next enquiry is whether the Plaintiffs have any such rights, which can be affected by the acts in question.

The Plaintiffs claim to have legal rights, both in their corporate, and individual capacities. In their corporate capacity, they claim the franchise of being, and continuing to be, a corporation, and the right to possess and enjoy all the privileges, granted and assured to them, by their charter; and among others, the right to the property, acquired under it. In their individual capacities, they claim the right to be members of the corporation, and to enjoy all the privileges, accruing to them from being members.

That many corporations have legal rights, and which of course cannot be abolished or infringed by the Legislature, cannot be doubted. It will not, as is believed be contended, that the Legislature can abolish incorporated Banks and insurance companies, and dispose of their property, at pleasure. Such corporations clearly have vested rights, with which the legislature cannot interfere.

There are corporations of different kinds, and with different incidents, which are all very exactly defined by law. To ascertain what are the rights of the corporation, under consideration, it must be seen, to what species or class of corporations, it belongs, and what are the incidents, and rights of that species or class.

The only division of corporations, material to the present enquiry, is that of civil and eleemosynary.

Civil corporations are constituted for the purpose of government; or for the encouragement of trade, and commerce, or such like purposes.³ Some of them may be, with propriety, and often are called public corporations. The division of a state, into counties and towns, for the purpose of civil government, creates public corporations. These sections or districts are organized, for the purpose of exercising certain functions of civil government. And over these, the legislature may without doubt exercise a controuling power, to a certain extent.

¹ Fletcher vs. Peck, 6 Cranch, 135.

² State of New-Jersey vs. Wilson, 7 Cranch, 164.

³ 1 Wood. 482.

Other civil corporations, established for the promotion of commerce, or the more convenient management of pecuniary concerns, are private, and with them the legislature has no power to interfere.

The general division of a state into counties and towns, as is done in this, and the other states of New-England, creates corporations of a peculiar kind, having a few only of the ordinary incidents of corporations. In this State, the corporate privileges of towns, with few exceptions, are conferred and limited by general laws, extending equally to all. A town, like a county, may be established without the consent of the inhabitants, who may be compelled, against their wills, to become members of the corporation. In this, there is nothing unjust or arbitrary, as a like provision extends to all the inhabitants of the state, who must be members of some town, and County Corporation. Although the privileges of such corporations may, in a certain degree be subject to legislative controul, it by no means follows that the legislature can, rightfully, take from any such corporation its property, and transfer it to another.

Somewhat similar to these, are incorporated cities, where all within certain limits, are included, and made members of the corporation. But where there is a special grant of peculiar privileges, the legislative power to new-model, or controul them, if admitted at all, must be with great limitation. The legislature cannot abolish such corporations, or do anything equivalent to it. As far as the privileges are peculiar, and such as cannot be affected by a general law, applicable to all, it is not easy to see on what principles they can be essentially changed or altered, by a special act of the legislature. But however that may be, if the legislature have a controuling power, over such corporations, it must be, because they are created, for the purpose of civil government, and are publick corporations. And consequently if it were admitted, that such power could be exercised over these corporations, it would not follow, that it might be so exercised over corporations of a different kind, and established for different purposes.

An eleemosynary corporation is always for charitable purposes. Its designs is, to secure the applications of donations to charitable uses, according to the directions of the donors. It has no concern with the civil government of the State, either general or local; nor in the promotion of commerce, or any other branch of business, which are the objects of civil corporations. It originates in private bounty, and its privileges are granted, for the purpose of perpetuating, and securing the application of the bounty, to the objects intended. And it is always a private, in contradistinction to publick corporations. All hospitals are eleemosynary and private corporations; and with them incorporated Colleges and Schools are always classed.¹

Hospitals and colleges or schools are always classed together, and alone constitute eleemosynary corporations. Professor Wooddeson says, "all eleemosynary corporations may I believe be included, under

¹ 1 Black. 471. — 1 Kyd 25.

the name of hospitals, colleges or schools ; in respect of visitation there seems no discrimination between Colleges and Hospitals.”¹ Colleges established, for securing the means of instruction, and for the promotion of learning, are eleemosynary, and private corporations, in the same sense, that Hospitals are, which are established, for securing the means of subsistence for the sick and poor. The object of eleemosynary corporations is to execute the wills of donors. He who gives to a charity, may surely direct the uses, to which his bounty shall be applied.

A striking mark of distinction, between civil and eleemosynary corporations, is, that the former is not, and the latter is subject to visitation. There can be no private visitors of civil corporations. Their disputes are determined, and the performance of their duties enforced, in courts of law. But all eleemosynary corporations have visitors, whose right and duty it is, to enforce the due observance of the regulations of the institution. To all colleges and schools for the purpose of instruction, visitation is a necessary incident, as it is also to Hospitals. This is laid down as an acknowledged principle, by all elementary writers, and appears to be universally admitted in the cases, where the rights of such corporations were in question.”²

“When governours are appointed, to superintend a charity, *they are in all cases visitors of the objects of the charity* ; when the application of the revenues is not immediately entrusted to them, they are also visitors, as to the application of the revenues ; and the Court of chancery has no jurisdiction over them ; but when the management of, and application of the revenues is immediately entrusted to them, then as to these they are subject to the controul of that Court.”³ This is the manner, in which the plaintiffs are incorporated. They are therefore themselves visitors of the corporation, as to the objects of the charity, and may be compelled faithfully to apply the revenues to those objects.

According to well established principles then, there can be no doubt, to which class of corporations the one in question belongs. It is clearly an eleemosynary corporation, and of consequence, a private corporation. It may be safely asserted, that not even the semblance of an authority can be produced to support a contrary opinion. It differs from civil and publick corporations, in all those particulars, which are supposed to give the legislature a right, to interfere in their concerns.

This being a private corporation, the plaintiffs have legal rights, and interests, which cannot be taken away or infringed, at the discretion of the legislature. The rights of private corporations are entitled to the same protection as the rights of individuals. A corporation is created for the purpose of securing and perpetuating rights. It is admitted

¹ 1 Wood. 474.

² Phillips vs. Bury, 1 Lord Ray. 5. — 1 Burr. 200. — 1 Black. 482.

³ 2 Kyd 195.

that corporate rights must originate, in a grant from the state; they are nevertheless legal rights. It is not pretended, that the legislature can resume its grants, to an individual, of either property or privileges. What better right has it, to resume its grants, to a private corporation, established to administer private charity? It is true, the expectation of public benefit was the inducement, to create the corporation. And in the present case that expectation has not been disappointed. The funds have been duly applied to the objects designed, or if not, that duty can be enforced, by the Courts of Justice. The expectation of public benefit is always the inducement for erecting corporations of every kind. Of course, if they answer the ends, for which they are established, the state derives advantages from them. But it does not follow, that all their property and privileges are held in trust for the public, and that the legislature may dispose of them, among the other public property, at pleasure. The state is entitled to all the benefits and advantages, stipulated for, in the grant of incorporation, and to nothing more. The state has an interest, that the property and privileges of an individual should be used, in such a manner as to be beneficial to the public. Is the individual therefore a trustee for the public, and may the legislature, on that ground, take his privileges, into their own hands? They have no better right to interfere, with private corporations, under pretence of their being public trusts.

An eleemosynary corporation is the means, devised by the policy of the law, to secure the fulfilment of the will of a charitable donor. The corporation is nothing more, than the means used to obtain an object; and can the law be justly charged, with the absurdity of converting the means, it has thus devised into an engine to defeat the object? Who would found an eleemosynary corporation, or give it property, for the purpose of securing it, for a special charitable use, knowing, that he thereby, subjected his property to any use, that a legislature, under the influence of momentary passion, or prejudice, might prefer? Very different is the protection, which the law affords to property, given to charitable uses, which it guards, at all points, with the most vigilant caution. It will carry into effect devises and conveyances, for charitable uses, under circumstances, which would render them void, if for any other purpose.

The circumstance, that this state has made donations to the corporation, does not alter its nature, nor lessen or destroy the plaintiffs' rights. The state, like other donors, gave on such conditions, as it pleased; and like other donors, it can enforce the fulfilment of the conditions. The state of Vermont also made donations, and would thereby seem to have as much power, on that ground, to interfere with the concerns of the corporation, as this state has. In the case of *Terrett & al. vs. Taylor & al.* where the attempt was, by a legislative act, to take away the property of the episcopal churches, in Virginia, and apply it to other uses, Judge Story, in delivering the opinion of the Court, says, "Had the property thus acquired, been originally granted by the State,

or the King, there might have been some colour, and it would have been but a colour, for such an extraordinary pretension.”¹

It is impossible, without disregarding all established principles and authorities, on this subject, to consider a private eleemosynary corporation, a publick trust, and its members, publick officers of the state, and therefore incapable of having any rights, of the character of private rights.

In most eleemosynary corporations, the objects of the charity, that is those who are individually to receive the benefit of it, are admitted and constituted members of the corporation. In a hospital, incorporated on that plan, the poor and sick to enjoy the benefit of the charity, must be admitted members of the corporation. Can they be said, to hold the property and privileges of the corporation, in trust for the publick, and to be all publick officers of the state? It has never been supposed, that the rights of a corporation so constituted were, in relation to the publick, different from those of a corporation, constituted as ours is.

It is admitted, the plaintiffs are trustees of the revenues of the corporation, and bound to apply them to the objects intended to be provided for, and that this trust may be enforced against them. But this is a private, not a publick trust. So also the corporate privileges are held in trust, partly for individual members of the corporation, but chiefly for those, who, though not members, are to receive the ultimate benefit of the charity. But although the plaintiffs hold the property and privileges in trust, they are still the legal owners, and have all the legal rights thereto appertaining. When a trustee asserts, in a Court of law, his right to property, conveyed to him in trust, it is surely no sufficient answer, to tell him the property is designed for the use and benefit of others, and that he individually suffers no injury, and therefore is entitled to no remedy. The chief design, of conveying property in trust, is to constitute the trustee a legal protector of it; because the *cestui que trust* is generally incompetent. A benefit to the trustee personally is not designed.

The true principle is, that a trustee, having the legal right, is entitled to all its remedies; and Courts of justice, instead of restraining him, often compel him to exert them. Were the law otherwise, all trust property would lie at the mercy of every invader. The *cestui que trust* cannot protect it, because not the legal owner; and if the trustee may not, it is without protection. In no case is the propriety and necessity, of allowing legal protection to property, in the hands of trustees, more apparent, than in that of corporations, like the present, for charitable purposes. For it is most manifest, the charity can, in no other way, be protected. To hold the trustees, on the ground of a supposed want of interest, are incompetent to protect the subject matter of the trust, would destroy, not only all charitable corporations, where trustees are introduced, but all trusts whatever.

¹ 9 Cranch 49.

In corporations, for the promotion of commerce, or the management of mere money concerns, it is not necessary, nor always the case, that those, who contribute the funds, and participate in the profits, should be members of the corporation. Persons having no interest in the funds, may be members of the corporation, and hold them in trust for those who are entitled to the profits. The trustees, in such a corporation, would unquestionably be competent in law, to protect all its rights.

There is then no ground, for raising such an interest in the state, or such a trust for those, to be benefited by the institution, as shall defeat the plaintiffs' rights. This is a private corporation, and of that kind the most favoured in law. And it has legal rights, if any corporation can have such rights. Any principle, which can be assumed, to deprive this corporation of legal rights, will be equally applicable to every other corporation, of whatsoever kind. The most private corporation, that can be established for the purpose of trade, or the management of money concerns, can make out no better claim to legal rights. A corporation, for the most charitable and benevolent purposes, surely has, both by legal principles, and according to the common opinion of mankind, rights, as inviolable, as those of a corporation, for the purpose of commerce and traffick. If these acts of the legislature can be supported, they can pass similar acts, in relation to any and every corporation. It is then for the defendant boldly to maintain, that no corporation has legal rights; but that all their property, and pretended privileges are held, at the mercy of the legislature.

Corporations must claim all their rights, by virtue of grants from the state; but they are not, for that reason, less secure or inviolable, than similar rights of individuals, derived from the same source. Peculiar privileges, granted by the state to individuals, although intended to promote the publick interest, become vested rights, and cannot be resumed. On what ground rests the distinction between these, and similar privileges, granted to private corporations? There is no secret or implied condition, to a grant, or charter of incorporation, that it may be revoked or annulled by the legislature, whenever it pleases.

The British Parliament can, as it is held, abolish corporations. So it can pass acts of attainder, and of pains and penalties. But neither can be done, by virtue of the ordinary and legitimate legislative power, which belongs to our legislature. According to the theory of the British government, the Parliament is omnipotent. "A corporation may be dissolved by act of Parliament which is *boundless*, in its operations."¹ In modern times, however, the exercise of these extraordinary powers, which are entirely incompatible with the existence of private rights of any kind, has been seldom resorted to.

The attempt was made, by the Bill introduced into Parliament, in the year 1783, by Mr. Fox, for new modelling the charter of the East India Company. The attempt was resisted and defeated. The city of London, in their petition against the bill, assert "that it was not only

¹ 1 Black. 484.

a high and dangerous violation of the charters of the Company, but a total subversion of all the principles of the law and constitution of that country." Lord Thurlow termed it "a most atrocious violation of private property, which cut every Englishman to the bone." Mr. Pitt opposed it, as being "a daring violation of the chartered rights of the Company."¹ The bill did not pass. But the attempt was so strongly denounced, by public opinion, that it ruined the party, which made it. In times of the greatest excess of arbitrary power in England, resort was seldom had to this unlimited power of Parliament. The great attempt to destroy, or controul the corporations, in the reign of Charles II. was made by the oppressive use of judicial proceeding, through the servility of dependent judges. The charters of the city of London, and of the colonies of Massachusetts and Connecticut, were declared forfeited on information of *quo warranto*.

But whatever be the extent of this undefined and arbitrary power, of the British Parliament, I trust it will not be contended, that it has descended to our legislature. The taking away of the colonial charters, under colour of that power, is justly classed among the grievous oppressions, which led to our independence. "Chartered rights" were then deemed, of too sacred a nature, to be voted away, as the passions or caprice of a legislature might incline. Will it now be asserted, that the British Parliament or King, or both united, were competent to abolish, or new model the colonial Charters? If it could be done, by legislative power alone, they might, for they possessed the whole legislative power over that subject matter.

In the opinion of the Supreme Court of the United States, in the case of *Terrett & al. vs. Taylor & al.* before mentioned, it is said, "The title was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it, nor of the Parliament, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured, only because it could not be resisted." "The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law, under which the inheritances of every man in the state were held. The State itself succeeded only to the rights of the crown."² If the plaintiffs forfeited none of these rights, by the revolution in government, the legislature had no more power over their rights, than previously existed, in the hands of some depository of power. The Parliament of Great Britain had no rightful power whatever over this corporation. The legislature of this state succeeded to all the power, which the King, who granted the charter had, and to no more.

In England the creating of corporations appertains to the King, and he has all the legitimate power, that exists for dissolving them; except what is vested in the judicial Courts.³ He can institute proceedings in the Courts, and for just cause obtain a forfeiture of all corporate rights

¹ Parliamentary Register, 1783, 4.

² 9 Cranch 50.

³ 1 Black. 3. 472.

and privileges; and then regrant them, as he pleases. He may also grant charters, to old corporations, with new modifications, which, if accepted, are binding. All this may the legislature of this state do.

But the King cannot abolish a corporation, or give it a new organization, or alter any of its powers or privileges, without its consent. This is the well established, and acknowledged doctrine of the common law.¹ On the ground that the King cannot resume the grant of a corporate privilege, it is held that the grant of a franchise, already granted, is void.² The King's grants, of corporate rights, bind him, as much as his grants of land. When therefore he has granted such rights, he cannot resume and regrant them, till it has been determined by due trial, in a Court of law, that they have become forfeited.

The remedy for the King, in such case, was a writ of quo warranto: in place of which, in latter times, the information of quo warranto has been used, as being more convenient. "A writ of quo warranto (says Judge Blackstone) is in the nature of a writ of right, for the King against him, who claims or usurps any office, franchise, or liberty; to enquire by what authority he supports his claim, in order to determine the right. It lies also, in the case of the non-user, or long neglect of a franchise, or misuser or abuse of it." "The judgment, on a writ of quo warranto being in the nature of a writ of right, is final and conclusive even against the crown."³ So far then from resuming his grants of corporate rights, at pleasure, the King was obliged to try his claim, for a forfeiture, like any other person, and if the determination was against him, the corporation was secured in the quiet enjoyment of them.

Corporations forfeit their rights, by nonuser or misuser, and are to be vacated by trial and judgment.⁴ Their powers cannot be newly modified, or altered, without their consent. In case of the offer of a new charter, to an old corporation, it may be accepted or rejected, as the corporation pleases; or part may be accepted, and part rejected.⁵ "During the violent proceedings, that took place in the latter end of the reign of Charles the II., it was among other things thought expedient to new model most of the corporation towns in the kingdom; for which purpose, many of those bodies were persuaded to surrender their charters, and informations in the nature of quo warranto were brought against others, upon a supposed or frequently a real forfeiture of their franchises, by neglect or abuse of them."⁶ Would the King, in those violent times have taken the trouble, of resorting to the Courts of law, if it had been supposed, that he might have resumed his grants, at pleasure. There was no pretence, that he could of his own authority, and without the agency of the Courts, lawfully interfere with, or controul any of the rights of corporations.

¹ King vs. Amory, 2 T. R. 515. King vs. Pasmore, 3 T. R. 240. King vs. Vice-Chancellor of Cam. 3 Burr. 16. 56.

² 2 Black. 37. — 2 T. R. 509.

³ 3 Black. 262. 3. 2 Ins. 282.

⁴ Thing vs. Pasmore, 3 T. R. 244. — 9 Cranch 51.

⁵ 3 Burr. 1656. — 3 T. R. 240. 246.

⁶ 3 Black. 263.

As successors to the King, then, the legislature have no power, to pass the acts in question. And it may be safely asserted, that before the change in the form of government, the plaintiffs could not have been rightfully deprived of their property or privileges, without a trial in due course of law. Do they now hold their rights by a tenure less secure, and more subject to arbitrary controul, than they did before the revolution? If the legislature may annul or repeal grants of corporate privileges, what shall restrain them from doing the same with grants of land? What are to be the limits of this newly discovered authority? Should the royal grants of land, made before the revolution, be examined, more instances of heedless extravagance will be found, than in any grants of corporate privileges. If one may be resumed, so may the other, for they both rest on the same principles for security.

We know from experience, that the legislative power is of an encroaching nature. Permit the legislature, in this instance, to abolish a charter of corporate privileges, and there will be no ground left, on which they can be restrained, from abolishing patents or grants of land. The great principle of security, for private property, will be destroyed. And let it be remembered that the attempt to vacate legal rights and titles, vested in individuals, has, in fact, been made by the legislatures of more than one of the states, in the Union. The only means of security is to abide by settled principles, and firmly resist the first attempt at encroachment. The law affords the same security and protection, for the enjoyment of franchises or privileges, as it does for other rights. An action for a disturbance of a franchise or privilege, is well known in law, and may be as easily maintained, either by an individual, or a corporation, as for any other injury.

As then a grant of privileges, to an individual creates legal rights, which cannot be infringed by legislative acts; and as there is no distinction, known in law, as to the effect of such a grant, when made to an individual, and when made to a private corporation, it follows, that the grant to the plaintiffs created legal rights, that were duly vested, and which of course cannot be infringed by the legislative acts in question. It is of no consequence, as it respects the right, whether the privileges, granted to the plaintiffs by their charter, are valuable, in a pecuniary point of view, or otherwise. They are essentially of the nature of private property, and consequently entitled to protection, like other private property.

The plaintiffs, in their aggregate capacity, are entitled to the franchise of being a corporation, and of enjoying all the privileges contained in their charter, according to its provisions. The President of the College is entitled to the quiet enjoyment of his office, with all the privileges and perquisites incident to it. And so also, the other members of the corporation are, individually, entitled to enjoy their respective privileges. In *Miller vs. Spateman*,¹ it is held, "That the law takes notice, that the natural members of the corporation, of whom the cor-

¹ 1 Saund. 344.

poration consists, are not strangers to the corporation, but are the parties interested in all the revenues and privileges of the corporation, of which they are members." A corporation may take a grant for the benefit of their particular members. In the celebrated case of *Ashby* vs. *White*, where an individual member of the corporation sued for an infringement of his right of suffrage, to which he was entitled, as a corporator, among the reasons assigned by the House of Lords for their judgment, it is said: "The inheritance of this privilege is in the corporation aggregate; but the benefit, possession, and exercise is in the persons of those who, by the constitutions of those charters, are appointed to elect. And in all cases, where a corporation hath such a privilege, the members thereof, in their private capacity, have the benefit and enjoyment thereof. It appears by other instances, that it is usual and proper for corporations to have interests granted them, which inure to the advantage of the members, in their private capacities."¹ Many cases are there stated of actions being maintained for the violation of such rights.²

Besides the right of the President to his office and emoluments, each individual trustee has the privilege of being a member, and of acting according to the provision of the charter, in all matters, relating to the government of the corporation, and in the management of its property, and in the conducting of all its concerns. These privileges, that the members of the corporation hold, in their private capacities, constitute vested rights, which are subject to no controul, but that of the law of the land.

It is not a new doctrine, that in a free government, the legislative power, without any direct and express restriction, is incompetent to abolish, or take away vested rights. It results from the very nature and design of a free government. This is plainly and forcibly asserted by Judge Chase, in delivering his opinion, in the case of *Calder* vs. *Bull*. "The purposes for which men enter into society, will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. *The nature and ends of legislative power will limit the exercise of it.* An act of the legislature, (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered as a rightful exercise of legislative authority. The obligation of a law, in governments, established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded." "A law that destroys or impairs the lawful private contracts of citizens; a law that makes a man judge in his own cause; or a law that takes property from A. and gives it to B. it is against all reason and justice for a people to entrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount

¹ 3 Hatsell's precedents, 221.

² *Walter vs. Hanger*. Moore. 882. — *Brooks Abr. Corporation*, 85.

to a prohibition of such acts of legislation ; and the general principles of law and reason forbid them. The legislature cannot change innocence into guilt, or punish innocence as a crime ; *or violate the right of an antecedent lawful private contract ; or the right of private property. To maintain that our federal, or state legislature possesses such powers, if they had not been expressly restrained would, in my opinion, be a political heresy, altogether inadmissible, in our free republican governments.*"¹

If then a correct view has been taken of the powers of the legislature and of the rights of the plaintiffs, it would not have been competent for the legislature to pass these acts, if there had been no special restrictions on the legislative power ; because they are not within the general scope of that power, and consequently void.

II. There are special restrictions, on the power of the legislature, in the constitution of this state, which these acts violate.

They violate that part of the 15th article of the bill of rights, which provides, " that no subject shall be arrested, imprisoned, despoiled, *or deprived of his property, immunities, or privileges*, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate ; but by judgment of his peers, or the law of the land." If these acts are valid, the plaintiffs are deprived of their property, and of the "immunities and privileges," granted to them by their charter, by other means, than the judgment of their peers, or the law of the land. The acts of the legislature take away their rights and privileges, without any trial whatever.

This provision of the Bill of rights was unquestionably designed to restrain the legislature, as well as the other branches of government, from all arbitrary interference with private rights. It was adopted from magna charta, and was justly considered by our forefathers, long before the formation of our constitution, as constituting the most efficient security of their rights and liberties.

Lord Coke, in his commentary on magna charta, explains the phrase "by the law of the land" to mean "*by due course and process of law.*" That is, no subject shall be deprived of his property, immunities, or privileges, but by judgment of his peers, or by due course and process of law. This then surely cannot be done by special act of the legislature, without judgment of peers, and without any process of law. To make his meaning still more plain, if possible, that Parliament was bound by this provision of magna charta, Lord Coke says, "*against this ancient and fundamental law, and in the face thereof*, I find an act of Parliament made, &c.² directing certain summary and arbitrary proceedings, *by colour of which act, shaking this fundamental law*, it is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson and Edmund Dudley," "and the ill success thereof, and the fearful ends of these two oppressors, should deter others from commit-

¹ 3 Dall. 383.

² Stat. 11, Hen. 7.

ting the like; and should admonish Parliaments, that instead of this *ordinary and precious trial per legem terrae*, they bring not in absolute and partial trials, by discretion."¹

It is sufficiently apparent, that Lord Coke understood this provision to extend to, and bind Parliament. Hence his complaint that Parliament had in that instance violated it, by dispensing with trials according to the law of the land; and authorizing, in certain cases, the exaction of forfeitures, on trials by the arbitrary discretion of magistrates. For even that act of Parliament, so justly denounced for its "horrible oppressions," did not, like the present acts of our legislature, attempt to divest, and take away private rights, without any trial at all. The construction of the provision has always been according to Lord Coke's opinion. It has never been doubted, that Parliament was morally bound by it. But the difficulty in England has been that Parliament, being omnipotent, in all matters of civil institution, is too powerful for the constitution, and cannot be restrained.

The same construction has been uniformly given to this provision, in the Courts of the different states of the Union. The Superior Court of South Carolina, in the case of *Bowman vs. Middleton*, decided that an act of the colonial legislature of 1712, taking property from one, and vesting it in another, without trial by jury, was void; because it infringed this provision of magna charta, which bound the legislature. They say, "that the plaintiffs can claim no title, under the act in question, as it was against common right, as well as against magna charta, to take away the freehold of one man, and vest it in another: and that too to the prejudice of third persons, without any compensation, or even a trial, by the jury of the country, to determine the right in question. That the act was therefore, ipso facto, void. That no length of time could give it validity, being originally founded on erroneous principles."² In a subsequent case, in the same Court, *Waties, J.*, said he had gone into a long investigation of the technical import of the words *lex terrae*, "that they meant the common law, and ancient statutes, down to the time of Edward II. which were considered, as part of the common law. That this was the true construction, given to them, by all the commentators on magna charta, from whence they were adopted by the constitution of South Carolina. If the *lex terrae* meant any law, which the legislature might pass, the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared should forever be inviolably preserved. This is too absurd a construction to be the true one. He understood therefore the constitution to mean, that no freeman shall be deprived of his property, but by such means, as are authorized by the ancient common law of the land. According to this construction the right of property is held under the constitution, and *not at the will of the legislature*."³ Of the same import is the opinion of the Supreme Court of Massachusetts. "If this (an act of the legislature) is to be construed a disposal, by the legisla-

¹ 2 Inst. 51.² 1 Bay. 252.³ 2 Bay. 59.

ture, of lands owned by that proprietary, (under which the plaintiff claimed) or by any individual, claiming by their grant or allotment, it militates directly, with a well known provision of magna charta, revived and enforced in the bill of rights, prefixed to the constitution of government, for this Commonwealth; that no subject shall be deprived of his property, but by the judgment of his peers, or the law of the land; *not any private and special statute, for the purpose, but that law, which affects alike, under the same circumstances, the whole territory and community.*"¹

This provision of magna charta is introduced into the 5th article of the amendments of the constitution of the United States. The terms, in which it is there expressed, show conclusively that it was understood in the same sense, that we contend it always has been understood. They are, that "no person shall be deprived of life, liberty, or property, *without due process of law.*" This is manifestly designed to secure a trial, according to the established laws of the land; and it certainly restrains the legislature, from depriving an individual of his life, liberty, and property, without such trial. The two phrases "law of the land" and "due process of law," as used in the two constitutions, doubtless have the same meaning. If otherwise, however, the result will be the same. For the legislature of this state is as much bound by this provision in the constitution of the United States, as they would be, were it contained in our own constitution. If the plaintiffs are deprived of their property by the acts in question, it certainly has not been done by due process of law. The law provides no such summary process, by which individuals may, without trial, be deprived of their rights.

Thus has this provision been always understood, as imposing a restraint on the legislative power, from the time it was first introduced into magna charta, down to the present time. It has been incorporated into the constitution of most of the states of the Union, and it is believed, that not a single judge, or commentator, either before, or since it was introduced into our constitution, has attempted to give it a different meaning. The terms used are general, embracing the legislature, equally with the other departments of government; and any reason, which can be assigned, for excepting the legislature from this restraint, may, with equal force, be applied, for excepting either, or both the other departments. Indeed if this provision were not applicable to the legislature, it would be idle and useless. The previous part of this article of the bill of rights, together with others, regulating the manner of trials, are more especially designed, to restrain the judiciary. This seems to be the only provision, to be found in the constitution of this state, against the legislature's passing special acts, for the regulation of individual cases. It restrains the legislature from passing acts, which spend their force on one, or more individuals, and are not to apply to others, under similar circumstances. The law of the land is applicable to the community at large.

¹ Little vs. Frost, 3 Mass. R. 117.

The greatest, if not only effectual, security against legislative oppression, is, that the law must be general, embracing all under like circumstances, and including the legislators among the rest. An oppressive law, applicable to the whole community, will soon be repealed. But if the legislature, under the influence of prejudice, or passion, to which all bodies of men, however constituted or selected, are occasionally subject, can pass acts, having the force of laws, to apply to a solitary individual only, he may be destroyed, before publick sympathy can be excited for his relief. A law, according to any just definition, that ever has, or can be given of it, must be general in its operation. It is a rule of conduct, for all, within the principle it establishes. An act of the legislature, prescribing a particular rule, for the government of one or more individuals, therein named, would not have the force of law, but would be void.¹ This principle is not inconsistent with the power of the legislature to pass private statutes. Such statutes, instead of taking away, confer privileges; and whatever regulations are imposed, in consideration of the privileges granted, become binding, by the assent of the parties, at whose application the statutes are passed.

If this construction, which has always hitherto been put on the article of the bill of rights, under consideration, is to be still abided by, it is conclusive in favour of the plaintiffs. Their charter grants them certain "immunities and privileges." This article provides, in effect, that they shall not be deprived of these "immunities and privileges," but by due trial, and according to the well known general laws of the land, which are binding on the whole community. The acts of the legislature, which are made for the purpose of depriving them of their immunities and privileges, without any trial whatever, must therefore be declared to be void.

These acts violate also the 23d article of the bill of rights, which provides that, "retrospective laws are highly injurious, oppressive and unjust. No such laws therefore should be made, either for the decision of civil causes, or the punishment of offences."

There can be no ground for dispute, as to what constitutes a retrospective law. In the case *Calder vs. Bull*, Judge Chase says, "every law, that takes away, or impairs rights, vested agreeably to existing laws, is retrospective."² The correctness of this definition of retrospective laws has never been disputed, as is known. It was adopted, and made the ground of decision, in the case of the *Society vs. Wheeler*, in the Circuit Court of the United States in this District. In the very able opinion there delivered, it is said, "upon principle, every statute, which takes away, or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities."³ It is not only against natural justice, but utterly

¹ Holden vs. James, 11 Mass. Rep. 396.

² 3 Dall. 391.

³ 2 Gall. 105.

inconsistent with every correct idea of a law, that it should be made to operate retrospectively on past actions, and vested rights.¹

This article prohibits the passing of retrospective laws of any kind, as well such as affect the rights of property, and individual privileges, as those, made for the punishing crimes. The latter, which are generally called *ex post facto* laws, and which are no more unjust than the former, have been denounced, by a most respectable authority, as being a more unreasonable, and cruel method of ensnaring people to their ruin, than that adopted, by the worst of the Roman emperors, who wrote his laws in a small character and hung them up on high pillars, to prevent their being read.²

It is hoped, that it has been already sufficiently shown, that the plaintiffs have vested rights, acquired under existing laws. If so, these acts, which infringe their rights, are retrospective, and void. The plaintiff's rights were perfect and complete. They were in the full enjoyment of their property and privileges, and by no existing law could they have been ousted or molested. If this article does not protect such rights, it is not easy to perceive what rights are protected by it.

The 37th article provides, that the three essential powers of government "ought to be kept, as separate from, and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection, which binds the whole fabrick of the constitution in one indissoluble bond of union and amity." This article has already been noticed, as bearing on the general powers of the legislature. It may also, with propriety, be considered as imposing a special restraint against the legislature's exercising judicial power. The limitation, with which this great elementary principle is adopted, does not, in any degree, lessen its force, in relation to the question under consideration. The bill of rights establishes general principles, by which the constitution of government was formed, and according to which, it is to be construed. The three departments of government are connected together, and in certain particulars, dependent on each other. The constitution declares the extent of this connection and dependence. Powers are, in certain cases and for special purposes, given to one department, which partake of the nature of the general powers of another department. This qualification was necessary to preserve consistency in the different parts of the constitution. For the conducting of impeachments, for instance, the legislature is vested with judicial power. It would therefore have been absurd, after this express grant of judicial power, in that case, to have declared, without qualification, that the legislature should exercise no judicial power.

By the proper construction of this article, each department is restrained, from exercising any of the general powers of another department, except in cases, where it is especially authorized by the constitution. A construction that should leave each department at

¹ Dash vs. Van Kleeck, 7 John. R. 477.

² 1 Black. 46.

liberty, to exercise the powers of another, whenever it might deem it expedient, would render the provision of the article useless. Indeed the language admits of no other construction than that before stated. The substance is, that the three powers of government shall be kept, as separate and independent, as is consistent, with the nature of a free government, and the provisions of the constitution. The free government, here meant, is doubtless one, where the rulers have no powers, other than what are delegated to them, by the people. Is it inconsistent with the nature of such a government, or with the provisions of our constitution, that the legislature should abstain from the exercise of judicial power, in cases where that power is not granted to them, but is granted to another department? We have already seen, that no free government can exist, without such a restraint on the legislative power.

Under the first point, it was shown, that the general legislative power did not extend, to the divesting of private rights, and that the passing of these acts which take from the plaintiffs their rights, and give them to others, was substantially an exercise of judicial power. That the legislature did not examine witnesses, and hear the parties, before they decided on their rights, shows only the extent of the oppression, and the total incompetency of the legislature to exercise judicial power, in such cases. As then no special authority is given to the legislature, to exercise judicial power, in this or similar cases, the acts violate also this article of the constitution.

III. It is contended that the acts violate the 10th section of the 1st article of the constitution of the United States, which provides that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

[The argument on this point is omitted.]

At November Term, 1817, in Grafton County, the opinion of the Court was delivered by

RICHARDSON, C. J.¹ This cause, which is trover for sundry articles alleged to be the property of the plaintiffs, comes before the court upon a statement of facts, in which it is agreed by the parties that the trustees of Dartmouth College were a body corporate duly organized under a charter bearing date December 13, 1769; that the several articles, mentioned in the writ, were the property of that body corporate, and that before the commencement of this action the said articles being in the possession of the defendant, he refused, although duly requested, to deliver them to the plaintiffs. Upon these facts it is clear, that judgment must be rendered for the plaintiffs, unless the facts, upon which the defendant relies, constitute a legal defence.

By an act of this state passed June 27, 1816, entitled "An act to

¹ From the docket entries, recited in 65 N. H. p. 624, note 1, it would seem that Mr. Justice Woodbury did not sit in this case; and that the only justices who sat were Richardson, C. J., and Bell, J. — ED.

amend the charter and enlarge and improve the corporation of Dartmouth College," it is among other things enacted "that the corporation heretofore called and known by the name of the Trustees of Dartmouth College shall ever hereafter be called and known by the name of the Trustees of Dartmouth University, and the whole number of said trustees shall be twenty-one, a majority of whom shall form a quorum for the transaction of business, and they and their successors in that capacity as hereby constituted, shall respectively forever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed, enjoyed and used by the trustees of Dartmouth College." — "And the governor and council shall by appointment as soon as may be, complete the present board of trustees to the number of twenty-one as provided for by this act, and shall have power also to fill all vacancies that may occur previous to, or during the first meeting of said board of trustees." By an act of this State passed Dec. 18, 1816, entitled "An act in addition to and in amendment of an act entitled an act to amend the charter, &c." it is declared "that the governor with advice of council is authorized to fill all vacancies that have happened, or may happen in the board of said trustees previous to their next annual meeting."

It is agreed by the parties, that in pursuance of the provisions of these acts, the governor and council "completed the said board of trustees to the number of twenty-one," by appointing nine new trustees, who accepted the trust; and that previous to the commencement of this action, at a meeting of the trustees of Dartmouth University held as the law requires, and composed of two of the former trustees of Dartmouth College and the nine new trustees appointed as aforesaid, being a sufficient number to constitute a quorum of the whole board of twenty-one, the defendant was duly appointed treasurer and secretary of the trustees of Dartmouth University; and the articles mentioned in the plaintiffs' writ duly committed to his custody as the property of the University.

It is also agreed, that nine of the old trustees of Dartmouth College have individually and as far as by law they could, as a corporation, refused to accept the provisions of the acts of June 27, and Dec. 18, 1816, and still claim to be a corporation as constituted by the charter of 1769, and to have the same controul over the property which belonged to the College, as they had before these acts were passed. And this action is brought to enforce that claim. If those parts of the acts above mentioned, which authorize the appointment of new trustees, are valid and binding upon the trustees of Dartmouth College, without their consent, this action cannot be maintained: because in that case the corporation must now be considered as composed of twenty-one members, and any claim of a minority of the corporation to controul the affairs of the Institution in opposition to the majority is clearly without any legal foundation. But if on the other hand those acts are

to be considered in that respect as unconstitutional and void, then the appointment and all the doings of the new trustees are invalid; the corporation remains as constituted by the charter of 1769; and the plaintiffs must prevail in this action. The decision of the cause must therefore depend upon the question, whether the legislature had a constitutional right to authorize the appointment of new trustees, without the consent of the corporation?

This cause has been argued on both sides with uncommon learning and ability, and we have witnessed with pleasure and with pride a display of talents and eloquence upon this occasion in the highest degree honourable to the profession of the law in this state. If the counsel of the plaintiffs have failed to convince us that the action can be maintained, it has not been owing to any want of diligence in research, or ingenuity in reasoning, but to a want of solid and substantial grounds on which to rest their arguments.

A complaint that private rights protected by the constitution have been invaded, will at all times deserve and receive the most deliberate consideration of this court. The cause of an individual whose rights have been infringed by the legislature in violation of the constitution, becomes at once the cause of all. For if a private right be thus infringed to-day, and that infringement be sanctioned by a judicial decision to-morrow, there will be next day a precedent for the violation of the rights of every man in the community; and so long as that precedent is followed, the constitution will be in fact to a certain extent repealed. An unconstitutional act must always be presumed to have been passed inadvertently or through misapprehension; and it is equally to be presumed that every honest legislator will rejoice when such an act is declared void, and the supremacy of the constitution maintained. But we must not for a moment forget, that the question submitted to our decision in such cases, is always one of mere constitutional right;—sitting here as judges, we have nothing to do with the policy or expediency of the acts of the legislature. The legislative power of this state extends to every proper object of legislation, and is limited only by our constitutions and by the fundamental principles of all government and the unalienable rights of mankind. In giving a construction however to a doubtful clause in the constitution, we might with propriety weigh the conveniences and inconveniences which would result from a particular construction, because in such a case arguments drawn from those sources might have a tendency to shew the probable intention of the makers of the constitution. But when the constitutional right to pass a law is clear, the question of expediency belongs exclusively to the legislature. Nor is an act in any case to be presumed to be contrary to the constitution. The opposition between that instrument and the act should be such as to produce upon our minds a clear and strong conviction of their incompatibility with each other, before we pronounce the act void. A decent respect for the other branches of the government, ought to induce us to weigh well the reasons, upon which

we found our opinions upon questions of this kind, and not to refuse to execute a law, till we are able to vindicate our judgment by sound and unanswerable arguments. For if we refuse to execute an act warranted by the constitution, our decision in effect alters that instrument, and imposes new restraints upon the legislative power, which the people never intended. On the other hand, if clearly convinced that an act of the legislature is unconstitutional, we should be unworthy of the station in which we are placed, if we shrunk from the duties which that station imposes.

In order to determine the question submitted to us, it seems necessary in the first place to ascertain the nature of corporations. — A corporation aggregate is a collection of many individuals united into one body under a special name, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, and having collectively certain faculties, which the individuals have not. A corporation considered as a faculty, is an artificial, invisible body, existing only in contemplation of law: and can neither employ its franchises nor hold its property, for its own benefit. In another view, a corporation may be considered as a body of individuals having collectively particular faculties and capacities which they can employ for their own benefit, or for the benefit of others, according to the purposes for which their particular faculties and capacities were bestowed. In either view it is apparent, that all beneficial interests both in the franchises and the property of corporations, must be considered as vested in natural persons, either in the people at large, or in individuals; and that with respect to this interest, corporations may be divided into *publick* and *private*.

Private corporations are those which are created for the immediate benefit and advantage of individuals, and their franchises may be considered as privileges conferred on a number of individuals, to be exercised and enjoyed by them in the form of a corporation. These privileges may be given to the corporators for their own benefit, or for the benefit of other individuals. In either case the corporation must be viewed in relation to the franchises as a trustee, and each of those, who are beneficially interested in them, as a *cestui que trust*. The property of this kind of corporations and the profits arising from the employment of their property and the exercise of their franchises, in fact belongs to individuals. To this class belong all the companies incorporated in this state, for the purpose of making canals, turnpike roads and bridges; also banking, insurance and manufacturing companies, and many others. Both the franchises and the property of these corporations exist collectively in all the individuals of whom they are composed; not however as natural persons, but as a body politick, while the beneficial interest in both is vested severally in the several members, according to their respective shares. This interest of each individual is a part of his property. It may be sold and trans-

ferred, may, in many cases, be seized and sold upon a *fiery facias*, and is assets in the hands of his administrator. This is by no means a new view of this subject. The supreme court of Massachusetts in the case of *Gray vs. The Portland Bank*,¹ most evidently viewed corporations of this kind in the same light. In the case of the *Bank of the United States vs. Devaux*,² the supreme court of the United States decided, that in determining a question of jurisdiction depending upon the citizenship of the parties, and a corporation being a party, they could look to the citizenship of the individual corporators as of the real litigants. The rejection of a corporator as a witness, in cases where the corporation is a party, on the ground of private interest is a matter of familiar practice in all our courts.

Publick corporations are those, which are created for publick purposes, and whose property is devoted to the objects for which they are created. The corporators have no private beneficial interest, either in their franchises or their property. The only private right which individuals can have in them, is the right of being, and of acting as members. Every other right and interest attached to them can only be enjoyed by individuals like the common privileges of free citizens, and the common interest, which all have in the property belonging to the state. Counties, towns, parishes, &c. considered as corporations, clearly fall within this description. A corporation, all of whose franchises are exercised for publick purposes, is a publick corporation. Thus if the legislature should incorporate a number of individuals, for the purpose of making a canal, and should reserve all the profits arising from it to the state, though all the funds might be given to the corporation by individuals, it would in fact be a publick corporation. So if the state should purchase all the shares in one of our banking companies, it would immediately become a publick corporation. Because in both cases all the property and franchises of the corporations would in fact be publick property. A gift to a corporation created for publick purposes is in reality a gift to the publick. On the other hand, if the legislature should incorporate a banking company for the benefit of the corporators, and should give the corporation all the necessary funds, it would be a private corporation. Because a gift to such a corporation would be only a gift to the corporators. So, should the state purchase a part of the shares in one of our banks, it would still remain a private corporation so far as individuals retained a private interest in it. Thus it seems, that whether a corporation is to be considered as publick or private, depends upon the objects for which its franchises are to be exercised; and that as a corporation possesses franchises and property only to enable it to answer the purposes of its creation — a gift to a corporation is in truth a gift to those who are interested in those purposes.

Whether an incorporated college, founded and endowed by an individual, who had reserved to himself a controul over its affairs as a

¹ 3 Mass. Rep. 379.

² 5 Cranch, 61.

private visitor, must be viewed as a publick or as a private corporation, it is not necessary now to decide, because it does not appear that Dartmouth College was subject to any private visitation whatever.

Upon looking into the charter of Dartmouth College we find that the king "being willing to encourage the laudable and charitable design of spreading christian knowledge among the savages of our American wilderness, and also that the best means of education be established in the province of New-Hampshire, for the benefit of said province" ordained that there should be a college created in said province by the name of Dartmouth College, "for the education and instruction of youth of the Indian tribes, in this land, in reading, writing and all parts of learning, which should appear necessary and expedient for civilizing and christianizing children of Pagans, as well as in all liberal arts and sciences, and also of English youth and any others;" and that there should be in the said Dartmouth College from thenceforth and forever, a body politick, consisting of trustees of Dartmouth College. He then "made, ordained, constituted and appointed" twelve individuals to be trustees of the College, and declared that they and their successors, should forever thereafter be a body corporate, by the name of the trustees of Dartmouth College; and that said corporation should be "able, and in law capable *for the use of said college*, to have, get, acquire, purchase, receive, hold, possess and enjoy tenements, hereditaments, jurisdictions and franchises, for themselves and their successors, in fee simple or otherwise;" — and "to receive and dispose of any lands, goods, chattels and other things of what nature soever, *for the use aforesaid*; and also to have, accept and receive any rents, profits, annuities, gifts, legacies, donations or bequests of any kind whatsoever, *for the use aforesaid*." Such are the objects, and such the nature of this corporation, appearing upon the face of the charter. It was created for the purpose of holding and managing property for the use of the college; and the college was founded for the purpose of "spreading the knowledge of the great Redeemer" among the savages and of furnishing "the best means of education" to the province of New-Hampshire. These great purposes are surely, if any thing can be, matters of publick concern. Who has any private interest either in the objects or the property of this institution? The trustees themselves have no greater interest in the spreading of christian knowledge among the Indians, and in providing the best means of education, than any other individuals in the community. Nor have they any private interest in the property of this institution, — nothing that can be sold or transferred, that can descend to their heirs, or can be assets in the hands of their administrators. If all the property of the institution were destroyed, the loss would be exclusively publick, and no private loss to them. So entirely free are they from any private interest in this respect, that they are competent witnesses in causes where the corporation is a party, and the property of the corporation in contest. There is in Peake's cases at Nisi Prius, 154, an authority direct to this

point. It is the case of Weller against the governors of the Foundling Hospital, and was assumpsit for work and labour. Most of the witnesses called on behalf of the defendants, were governors and members of the corporation. Lord Kenyon was of opinion that they were nevertheless good witnesses, because they were mere trustees of a publick charity, and had not the least personal interest. The office of trustee of Dartmouth College is, in fact, a publick trust, as much so as the office of governor, or of judge of this court; and for any breach of trust, the State has an unquestionable right, through its courts of justice to call them to an account. The trustees have the same interest in the corporate property, which the governor has in the property of the state, and which we have in the fines we impose upon the criminals convicted before this court. Nor is it any private concern of theirs, whether their powers, as corporators, shall be extended or lessened, any more than it is our private concern whether the jurisdiction of this court shall be enlarged or diminished. They have no private right in the institution, except the right of office, — the right of being trustees, and of acting as such. It therefore seems to us, that if such a corporation is not to be considered as a publick corporation, it would be difficult to find one that could be so considered.

It becomes, then, unnecessary to decide in this case, how far the legislature possesses a constitutional right to interfere in the concerns of *private corporations*. It may not however be improper to remark, that it would be difficult to find a satisfactory reason why the property and immunities of such corporations should not stand, in this respect, on the same ground with the property and immunities of individuals.

In deciding a case like this, where the complaint is that corporate rights have been unconstitutionally infringed, it is the duty of the court to strip off the forms and fictions with which the policy of the law has clothed those rights, and look beyond that intangible creature of the law, the corporation which in *form* possesses them, to the individuals and to the publick, to whom in *reality* they belong, and who alone can be injured by a violation of them. This action, therefore, though *in form* the complaint of the corporation, must be considered as in *substance* the complaint of the trustees themselves.

The acts in question can only effect *publick* or *private* rights and interests. With regard to the rights and interests which the *publick* may have in this Institution, — no provision in the constitution of this state, nor of the United States, is recollected, which can protect them from legislative interference. We have been referred to no such provision in the argument. The clauses in those constitutions, upon which the plaintiffs' counsel have relied, were most manifestly intended to protect private rights only. All publick interests are proper objects of legislation; and it is peculiarly the province of the legislature, to determine by what laws those interests shall be regulated. Nor is the expediency, or the policy of such laws, a subject for judicial decision. The constitution has given to the general court full power and authority

to make and ordain all such laws "as *they* may judge for the benefit and welfare of this state." Should we assume the power of declaring statutes valid or invalid, according to our opinion of their expediency, it would not be endured for a moment, but would be justly viewed by all, as a wanton usurpation, altogether repugnant to the principles of our government. Nor are these plaintiffs competent to call in question the validity of these laws in a court of justice, on the ground that they are injurious to the publick interests. A law is only the publick will duly expressed. These trustees are the servants of the publick, and the servant is not to resist the will of his master, in a matter that concerns that master alone. If these acts be injurious to the publick interests, the remedy is to be sought in their repeal, not in courts of law. But if these acts infringe *private* rights, protected by the constitution, whether of the trustees themselves, or of others, whose rights they, from their situation, are competent to vindicate, then the plaintiffs have proper grounds, upon which to submit their validity to our decision.

All private rights in this institution must belong, either to those who founded, or whose bounty has endowed it; to the officers and students of the college; or to the trustees.

As to those who founded or who have endowed it; no person of this description, who claims any private right, has been pointed out or is known to us. It is not understood that any person claims to be visitor of this college. An absolute donation of land or money to an institution of this kind, creates no private right in it. Besides, if the private rights of founders or donors have been infringed by these acts, it is their business to vindicate their own rights. It is no concern of these plaintiffs. When founders and donors complain, it will be our duty to hear and decide; but we cannot adjudicate upon their rights, till they come judicially before us. It has been strenuously urged to us, in the argument, that these acts will tend to discourage donations, and are therefore impolitick. Be it so. That was a consideration very proper to be weighed by those who made the acts, but is entitled to no weight in this decision.

The officers and students of the college have, without doubt, private rights in the institution — rights which courts of justice are bound to notice — rights, which, if unjustly infringed, even by the trustees themselves, this court upon a proper application, would feel itself bound to protect. But for any injury done to their rights, they have their own remedy. It would be unjust to prejudge their case on this occasion. They are not parties to this record, and cannot be legally heard in the discussion of this cause. If no form of action given them by law can be conceived; it is because these acts do no injury to their rights.

The real question then is, do these acts unconstitutionally infringe any private rights of these trustees? It is said that these acts in fact, attempt to dissolve the old corporation, to create a new one, and to transfer the property of the old corporation to the new; and are there-

fore void on the principle decided in *Territ & al. vs. Taylor*.¹ But admitting this to be the attempt, we might with great propriety remark, in the language of Ashurst justice, in the case of the King against Pasmore,² that “the members of the old body, have no injury or injustice to complain of, for they are all included in the new charter of incorporation, and if any of them do not become members of the new incorporation, but refuse to accept, it is their own fault.” But it seems to us impossible to suppose, that the legislature intended by these acts, to dissolve the old corporation or to create a new one: nor do we conceive that the addition of new members, can in any case be considered as a dissolution of a corporation. The legislature of this state have not unfrequently annexed tracts of inhabited territory to towns, and thereby added new members to the corporation. Yet who ever supposed that this was a dissolution of the old, and the creation of a new corporation? Our statute of Dec. 11, 1812,³ makes the shares and interest of any person, in any incorporated company, liable to be seized and sold upon execution, and gives to the purchaser all the privileges appertaining thereto; and of course makes him a member of the corporation. But the thought probably never occurred to any man, that when a new member is added, by virtue of that act, the corporation is thereby dissolved, and a new one created. Yet that act has at least, as much dissolving, and as much creating force, as the acts now under consideration.

The plaintiffs, in taking this ground, seem not to have adverted to a material distinction, which, certainly exists between the rights and faculties relating to corporations, which can exist only in the corporators, as natural persons, and the corporate rights and faculties, which can exist only in the corporation. The right to the beneficial interest in the corporate property, can only exist in natural persons. But the legal title and ownership in corporate property, can in no case be considered as vested in the several corporators, as natural persons, either jointly or severally, but collectively in all, as one body politic, made capable by the policy of the law, of holding property as an individual. This artificial individual, which is said to be immortal, holds in all cases the legal title. Hence a corporation may maintain trespass against any of its members, who intermeddle with its property without its consent. Hence too, the legal title of a corporation in lands, will not pass by the deed of all its members. This faculty of holding property as an individual, which the policy of the law vests in a body of natural persons, that can be perpetuated by known rules of law, is one of the great ends and uses of an incorporation. But the natural persons who compose this artificial, immortal individual, in which the property is vested, must, in the nature of things, be continually fluctuating and changing; and yet the artificial individual remains in contemplation of law the same. It is therefore clear, that the legal identity of a corporation does not depend upon its being composed of

¹ 9 Cranch, 43.

² 3 Durnford and East, 244.

³ N. H. Laws, 184.

the same natural persons, and that an addition of new members to a corporation, cannot, in itself, make it a new and different corporation. The immortality of a corporation depends upon a continued accession of new members. The mode in which this accession is effected, is immaterial. A few of our corporations are perpetuated by a power of electing new members, placed in the corporations themselves. But most of our publick, and all our private corporations, are perpetuated by mere operation of law, without any corporate act whatever. Nor, by the addition of new members, is any part of the legal title to the corporate property, transferred from the old to the new members. That title remains unaltered in the corporation. The old members had not personally any such title that could be taken from them; and the new members have personally acquired none. The error of the plaintiffs on this subject, probably originated in their supposing that the legal title to corporate property is vested in the corporators, in the same manner that the title to partnership property is vested in co-partners. Indeed their counsel endeavored to illustrate this point, by comparing corporate to partnership property. And if the comparison had been just, the inferences which the counsel made, would also have been just. But the comparison does not hold, unless we are entirely mistaken as to the manner in which the legal title to corporate property is vested. The addition of new members by a legislative act, even to a private corporation, does not necessarily divest the old corporators, of any private beneficial interest, which they may individually have in the corporate property. Suppose the legislature should enact, that the governor should be *ex-officio* a member of all the banking corporations in the state. This might give him a personal influence in the management of their concerns, but would give him no beneficial interest whatever, in the corporate property. The interest of the stock-holders would remain the same. In the case of corporations, where all the benefit derived from them consists in the privileges incident to membership, as in incorporated library companies, it may be otherwise. But in the property of publick corporations, there is no private beneficial interests that can be divested. We are therefore of opinion, that these acts, if valid, do not dissolve the old corporation, nor create a new one; nor do they operate in such manner as to change or transfer any legal title, or beneficial interest, in the corporate property, but the legal title remains in the corporation, and the beneficial interest in the publick, unaffected.

It has also been contended, that it depends altogether upon contract, whether the old trustees shall become members of the corporation as now organized; that there can be no contract without consent, and that therefore, these acts cannot bind the old trustees without their consent, and must in the nature of things, be invalid. The whole amount of this argument is this: a statute, which attempts to compel the members of a corporation to become members of that corporation, differently organized, without their consent is invalid; and as

these acts make such an attempt, they are therefore invalid. To this there are two decisive answers. 1. Neither of the propositions upon which the conclusion rests is true. 2. Admitting the premises to be correct, the legitimate conclusion to be drawn from them, is wholly irrelevant to the question in this case. In the first place, the proposition that it depends altogether upon contract, whether individuals shall become members of particular corporations, is not universally true; and so far as respects publick corporations, is never true. The legislature has a most unquestionable right, to compel individuals to become members of publick corporations. Thus when a town is incorporated, all the inhabitants become members of the corporation, and continue members so long as they reside within its limits, whether they consent or not. Nor is there any good reason to doubt that the legislature possess the right to compel individuals to accept the office of trustees of Dartmouth College, however the corporation may be organized, any more than there is to doubt the right of the legislature to compel individuals to serve as town officers, as is done by our statute of Feb. 8, 1791,¹ or to be enrolled in the militia and hazard their lives in defence of the state. It is a fundamental principle of all governments recognized in the twelfth article of our bill of rights, that a state has a right to the personal service of its citizens, whenever the publick necessity requires it, — and the government has a right to judge of that necessity. There is a very strong case in 2 Modern Rep. 299. *The Attorney general vs. Sir John Read*. It was an information against Read, for refusing to serve as high sheriff of Hertfordshire. His defence was, that being under sentence of excommunication, he could not receive the sacrament: and that by serving as high sheriff without receiving it, he subjected himself to a penalty of £500, but the court held that he was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication: and gave judgment against him. — Nor is the proposition, that these acts attempt to compel the old trustees to become members of this corporation as now organized, without their consent, true. They are left perfectly at liberty to continue members of this corporation or not, according to their own pleasure. It is enacted, that the board shall hereafter consist of twenty-one members; but it is not enacted that they shall continue members of it against their consent. They had, before these acts were passed, a perfect right to resign when they pleased; and that right is not impaired by these acts.

But in the second place, admitting the premises to be true, the legitimate conclusion does not bear upon the question in this case. The fair conclusion to be drawn from the premises, is, that these acts, so far as they attempt to compel the old members to become members of the corporation, as now organized, are invalid. But the question here is not, whether the legislature can compel the old trustees to become

¹ Laws, 241.

members of the newly organized corporation, but whether it has a constitutional right to make a new organization of the corporation, by adding new members? And it is very apparent, that although the legislature may not possess the power to do the one, yet still it may have a constitutional right to do the other. There is a clear distinction between laws binding corporate bodies, and laws attempting to bind individuals to continue members of corporate bodies. Thus the legislature has an undoubted right, at all times, to pass laws binding the whole body politick of the state; but it is by no means clear, that the legislature has at all times a right to compel individuals to remain in the state, and be subject to those laws. So the legislature has a right to incorporate towns; but can it compel the inhabitants to remain in them, and continue members of such corporations?

But what is such a new organization of a corporation as cannot be made, without the consent of the corporators? If new members cannot be added, can any new duty be imposed upon a corporation; or can the corporate powers and faculties be in any way limited, without such consent? Our statute of June 21, 1814, (laws 284) makes it the duty of the several incorporated banks, to make a return of the state of their several banks, to the governor and council, annually, in June, under a penalty of \$1000. If the doctrine of these plaintiffs be true, may not the stockholders say that they cannot be compelled to be members of corporations, subject to new and different duties, without their consent, and that therefore this act is void? And may not the same argument be used in regard to the acts of June 11, 1803, and June 17, 1807, which prohibit banks from issuing bills of a certain description? In fact, does not this doctrine amount to a denial of the right to legislate at all, on the subject of corporations, without their consent?

But, although an artificial individual, capable of holding the legal title to property, may be created by the policy of the law, and a kind of artificial will and judgment as to the management of its concerns, given to it by making the consent of a number of natural persons necessary in all its acts; yet still this artificial will and judgment is, after all, only the private will and judgment of natural persons, in some respects limited and restricted. In this point of view, a corporation may be considered as a body of natural persons, having power and authority vested in them, to manage the corporate concerns in such manner as a majority of a competent number of them may judge and determine to be best calculated to answer the ends of the incorporation. And it has been truly said, by the counsel of the plaintiffs, that by the charter of 1769 exclusive power and authority was given to the twelve trustees to manage the affairs of this corporation in such manner as a majority of any seven or more of them, duly convened for the purpose, might judge most expedient to answer the purposes of the institution; and that the right of the twelve, to exercise that exclusive power and authority is taken away by these acts, and others admitted to share

that power and authority with them. Such is, without doubt, the operation of these acts; and it seems to us that this is the whole ground of complaint, which the plaintiffs can have. These acts compel the old trustees to sacrifice no private interest whatever, but merely to admit others to aid them, in the management of the concerns of a publick institution: and if they have no private views to answer, nor private wishes to gratify, in the management of those concerns, (and it would be very uncharitable to suppose they can have, for it is extremely dishonourable to prostitute publick interest to private purposes) it is not very easy to see how this can furnish any very solid ground of complaint. Had the affairs and concerns of Dartmouth College been their own private affairs and concerns, such an interference would have had a very different complexion.

But the plaintiffs contend that these acts impair their right to manage the affairs of this institution, in violation of that clause in the fifteenth article in our bill of rights, which declares that "no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities; or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." That the right to manage the affairs of this college, is a privilege within the meaning of this clause of the bill of rights, is not to be doubted. But how a privilege can be protected from the operation of a law of the land, by a clause in the constitution declaring that it shall not be taken away, but by the law of the land, is not very easily understood. This clause in our bill of rights, seems to have been taken from the 29th chapter of Magna Charta. "No freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be out-lawed or exiled, or any otherwise destroyed, nor will we pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land." The origin and history of Magna Charta is familiar to lawyers and politicians. Sullivan in his Lectures, 383-4, says that this chapter is the corner stone of English liberties, made in affirmance of the old common law; and that by the bare reading of it, we may learn the extravagancies of king John's reign, which it was intended to redress. It is evident, from all the commentaries upon it by English writers, that it was intended to limit the powers of the crown, and not of parliament.¹ Thus the franchises of a corporation are protected by this clause, in the great charter, and cannot be taken away by the king, unless by due process of law in his courts of justice for a forfeiture incurred. But parliament can dissolve a corporation by statute.² The object of the clause in our bill of rights, now under consideration, seems always to have been understood in this state, to be the protection of private rights, from all interference of single branches of the government, and of individual magistrates, not

¹ Sullivan's Lectures, 383-408. ² Institute, 45. ⁴ Blackstone's Commentaries, 423.

² 1 Blackstone's Commentaries, 485.

warranted by law. Thus if the house of representatives or the senate, or the governor and council, or even a court should order an individual to be arrested, or his property to be seized in a case not warranted by the law of the land, it would be a violation of this clause in the bill of rights. — So if an individual were arrested upon the warrant of a justice of the peace, the cause of which had not been previously supported by oath or affirmation, this clause in the bill of rights would be violated. At this term, in this county, we have decided, in the case of *Hutchins vs. Edson*, that an arrest upon an execution issuing from this court, but not under seal, which is required both by the constitution and by statute, was a violation of this clause in the bill of rights and altogether illegal and void. But all statutes, not repugnant to any other clauses in the constitution, seem always to have been considered as “the law of the land,” within the meaning of this clause. Thus, our statute of December 24, 1799, authorizes selectmen and tythingmen, within their respective precincts, to stop persons suspected of travelling unnecessarily on the Sabbath; and if no sufficient excuse be given, to detain them in custody, until a trial can be had; and in the case of *Mayo vs. Wilson and others*, Cheshire, May 1817, we decided, after very mature consideration, that an individual who had been duly arrested and detained in pursuance of that statute, must be considered as having been deprived of his liberty “by the law of the land.”

We have publick statutes, authorizing the selectmen of towns to take the lands of individuals for highways, and empowering firewards “to pull down, blow up or remove any house or buildings,” when necessary to stop the progress of fire. We have private acts, giving to turnpike corporations authority to take the land of individuals for their roads. Under all these statutes, the property of individuals is often taken without their consent; and yet it seems never to have been doubted that those statutes were “the law of the land,” within the meaning of the constitution. By the statute of December 24, 1805, entitled “an act respecting idle persons,” judges of probate are authorized, in certain cases, to appoint guardians of idle persons, and thereby take from them all controul over both their real and personal estate. This act has been in our statute book nearly twelve years, as a part of “the law of the land,” and no one has ever called its validity in question. By an act of December 11, 1804,¹ a part of the town of Wendell, in the county of Cheshire, is annexed to the town of New-London, in the county of Hillsborough, and by that act the exclusive power and authority of the former inhabitants of New-London, to manage their corporate concerns, is taken away in the same manner that the exclusive authority of these plaintiffs, to manage the affairs of Dartmouth College, is taken away. The same thing has frequently been done to other towns. Yet it has never been made a question in our courts, whether those acts were “the law of the land,” within the

¹ Laws, 51.

meaning of this clause in the bill of rights. Indeed, if this clause is to be construed to protect private property and rights from all legislative interference, what construction is to be given to that clause in the twelfth article in the bill of rights, which declares that "no part of a man's property shall be taken from him, or applied to publick uses, without his own consent or that of the representative body of the people?" The cases in which a man's property may be taken from him, or applied to publick uses, with the consent of the representative body, are not specified; but it undoubtedly includes all those not expressly protected by other clauses of the constitution. No one of the acts just mentioned, seems to afford to the individuals, whose property and privileges may be affected by them, a less solid ground of complaint than the acts in question do to the plaintiffs. If the latter be repugnant to this clause in the constitution, so must be the former. There seems to be no substantial difference in the cases, on which a solid distinction can be founded. If we decide that these acts are not "the law of the land," because they interfere with private rights, all other acts, interfering with private rights, may, for ought we see, fall within the same principle; and what statute does not either directly or indirectly, interfere with private rights? The principle would probably make our whole statute book a dead letter. We cannot adopt it; but are clearly of opinion that these acts, if not repugnant to any other constitutional provision, are "the law of the land," within the true sense of the constitution.

But it is said, that the charter of 1769 is a contract, the validity of which is impaired by these acts, in violation of that clause in the tenth section of the first article of the constitution of the United States, which declares that "No state shall pass any law, impairing the obligation of contracts." It has probably never yet been decided, that a charter of this kind is a contract within the meaning of the constitution of the United States. None of the cases cited, were like the present. In the case of *Fletcher vs. Peck*,¹ there was an express contract, a conveyance of lands to individuals, for their own use. In the case of *New-Jersey vs. Wilson*,² there was also an express contract, a treaty, by which lands with a particular privilege annexed to the lands themselves, were granted to individuals for their own use, and upon a valuable consideration paid.

This clause, in the constitution of the United States, was obviously intended to protect private rights of property, and embraces all contracts relating to private property, whether executed or executory, and whether between individuals, between states, or between states and individuals. The word "contracts" must however be taken in its common and ordinary acceptation, as an actual agreement between parties, by which something is granted or stipulated, immediately for the benefit of the actual parties. But this clause was not intended to limit the power of the states, in relation to their own publick officers

¹ 6 Cranch, 87.

² 7 Cranch, 164.

and servants, or to their own civil institutions, and must not be construed to embrace contracts, which are, in their nature, mere matters of civil institution; nor grants of power and authority, by a state to individuals, to be exercised for purposes merely publick. Thus, marriage is a contract; but being a mere matter of civil institution, is not within the meaning of this clause. A law, therefore, authorizing divorces, though it impairs the validity of marriage contracts, is not a violation of the constitution of the United States. Thus too many of our penal statutes give a part of the penalties and forfeitures incurred under them, to particular individuals, and whenever a penalty or forfeiture is incurred, such individuals have a vested right to sue for and recover such forfeitures and penalties. But a repeal of those acts, at any time before an actual recovery, has always been held to divest this right.¹ Such repeal, therefore, clearly impairs the validity of the grant; but no one ever supposed that such grant was a contract within the meaning of this clause. In the case of the *Commonwealth vs. Bird*,² it was decided, that the legislature had a constitutional right to take away from individuals an exemption from military duty, acquired under existing laws; and it seems never to have occurred, either to counsel or the court, that the laws granting the exemption, were a contract within the meaning of this clause in the constitution. The legislature, both in this state and in Massachusetts, have always claimed and exercised the right of dividing towns; of enlarging or diminishing their territorial limits; of imposing new duties or limiting their powers and privileges, as the publick good seemed to require; and this without their consent. Yet this right seems never to have been called in question, on the ground that their charters were contracts, within the meaning of this clause. All our judges, justices of the peace, sheriffs, &c. hold their offices under grants from the governor and council, in pursuance of statutes. But who ever supposed that these grants were contracts within the meaning of this clause of the constitution of the United States. The distinction we have here endeavored to lay down, between the contracts which are, and which are not intended by that instrument, seems to us to be clear and obvious. If the charter of a publick institution, like that of Dartmouth College, is to be construed as a contract, within the intent of the constitution of the United States, it will, in our opinion, be difficult to say what powers, in relation to their publick institutions, if any, are left to the states. It is a construction, in our view, repugnant to the very principles of all government, because it places all the publick institutions of all the states beyond legislative controul. For it is clear that congress possesses no powers on the subject. We are therefore clearly of opinion, that the charter of Dartmouth College is not a contract, within the meaning of this clause in the constitution of the United States.

But admitting that charter to have been such a contract; what was

¹ 1 Gallison, 177. — 5 Cranch, 281. — And *Lewis vs. Foster*, Cheshire, May 1817.

² 12 Mass. Rep. 443.

the contract? Can it be construed to be a contract on the part of the king with the corporators, whom he appointed, and their successors, that they should forever have the controul of the affairs of this institution, and be forever free from all legislative interference, and that their number should not be augmented or diminished, however strongly the publick interest might require it? Such a contract, in relation to a publick institution, would, as we conceive, be absurd and repugnant to the principles of all government. The king had no power to make such a contract, and thus bind the sovereign authority on a subject of mere publick concern. Nor does our legislature possess the power to make such a contract. Had it been provided in the act of June, 1816, that the twenty-one trustees should forever have the exclusive controul of this institution, and that no future legislature should add to their number, does any one suppose such a provision would have been binding upon a future legislature? Or suppose the legislature should enact that the number of judges of this court should never be augmented: is it possible to suppose that such an act could abridge the power of a succeeding legislature on the subject? We think not. A distinction is to be taken between particular grants, by the legislature, of property or privileges to individuals, for their own benefit, and grants of power and authority to be exercised for publick purposes. The former is in its nature, special legislation, in relation to private rights; the latter is general legislation, in relation to the common interests of all. Chief Justice Marshall, in the case of *Fletcher vs. Peck*,¹ adverts to this distinction, where he says "the correctness of this principle, that one legislature cannot abridge the powers of a succeeding legislature so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested, is a fact and cannot cease to be a fact." We are therefore of opinion, that if this charter can be construed to be a contract within the meaning of the constitution of the United States; yet still it contains no contract binding on the legislature, that the number of trustees shall not be augmented, and that the validity of the contract is not impaired by these acts.

I have looked into this case with all the attention, of which I am capable, and with a most painful anxiety to discover the true principles, upon which it ought to be decided. No man prizes more highly than I do, the literary institutions of our country, or would go farther to maintain their just rights and privileges. But I cannot bring myself to believe, that it would be consistent with sound policy, or ultimately with the true interests of literature itself, to place the great publick institutions, in which all the young men, destined for the liberal professions, are to be educated, within the absolute controul of a few

¹ 6 Cranch, 135.

individuals, and out of the controul of the sovereign power — not consistent with sound policy, because it is a matter of too great moment, too intimately connected with the publick welfare and prosperity, to be thus entrusted in the hands of a few. The education of the rising generation is a matter of the highest publick concern, and is worthy of the best attention of every legislature. The immediate care of these institutions must be committed to individuals, and the trust will be faithfully executed so long as it is recollected to be a mere publick trust, and that there is a superintending power, that can and will correct every abuse of it. But make the trustees independent, and they will ultimately forget that their office is a publick trust — will at length consider these institutions as their own — will overlook the great purposes for which their powers were originally given, and will exercise them only to gratify their own private views and wishes, or to promote the narrow purposes of a sect or a party. It is idle to suppose that courts of law can correct every abuse of such a trust. Courts of law cannot legislate. There may be many abuses, which can be corrected by the sovereign power alone. Nor would such exemption from legislative controul be consistent with the true interests of literature itself, because these institutions must stand in constant need of the aid and patronage of the legislature and the publick; and without such aid and patronage, they can never flourish. Their prosperity depends entirely upon the publick estimation in which they are held. It is of the highest importance that they should be fondly cherished by the best affections of the people, that every citizen should feel that he has an interest in them, and that they constitute a part of that inestimable inheritance, which he is to transmit to his posterity in the institutions of his country. But these institutions, if placed in a situation to dispute the publick will, would eventually fall into the hands of men, who would be disposed to dispute it; and contests would inevitably arise, in which the great interests of literature would be forgotten. Those who resisted that will, would become at once the object of popular jealousy and distrust: their motives, however pure, would be called in question, and their resistance would be believed to have originated in private and interested views, and not in regard to the publick welfare. It would avail these institutions nothing that the publick will was wrong, and that their right could be maintained in opposition to it, in a court of law. A triumph there might be infinitely more ruinous than defeat. Whoever knows the nature of a popular government, knows that such a contest could not be thus settled by one engagement. Such a triumph would only protract the destructive contest. The last misfortune which can befall one of these institutions, is to become the subject of popular contention.

I am aware that this power in the hands of the legislature may, like every other power, at times be unwisely exercised; but where can it be more securely lodged? If those, whom the people annually elect to manage their publick affairs, cannot be trusted, who can? The people

have most emphatically enjoined it in the constitution, as a duty upon "the legislators and magistrates, in all future periods of the government, to cherish the interests of literature and the sciences and all seminaries and publick schools." And those interests will be cherished, both by the legislature and the people so long as there is virtue enough left to maintain the rest of our institutions. Whenever the people and their rulers shall become corrupt enough to wage war with the sciences and liberal arts, we may be assured that the time will have arrived, when all our institutions, our laws, our liberties must pass away, — when all that can be dear to freemen, or that can make their country dear to them, must be lost, and when a government and institutions must be established, of a very different character from those under which it is our pride and happiness to live.

In forming my opinion in this case, however, I have given no weight to any considerations of expediency. I think the legislature had a clear constitutional right to pass the laws in question. My opinion may be incorrect, and our judgment erroneous, but it is the best opinion, which upon the most mature consideration, I have been able to form. It is certainly, to me, a subject of much consolation, to know that if we have erred, our mistakes can be corrected, and be prevented from working any ultimate injustice. If the plaintiffs think themselves aggrieved by our decision, they can carry the cause to another tribunal, where it can be re-examined, and our judgment be reversed, or affirmed, as the law of the case may seem to that tribunal to require.

Let judgment be entered for the defendant.

After the entry of judgment for defendant, the plaintiffs sued out a writ of error to remove the cause to the Supreme Court of the United States, where it was entered at February Term, 1818. The assignment of errors is given in Farrar, pp. 235, 236.

The cause was argued before the U. S. Supreme Court in March, 1818, by *Webster* and *Hopkinson*, for plaintiffs in error; and by *Wirt*, attorney-general, and *Holmes*, for defendant in error.

At February Term, 1819, the judgment of the Court was pronounced by

MARSHALL, C. J. This is an action of trover, brought by the Trustees of Dartmouth College, against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repug-

nant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter, dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in con-

struction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any State legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law, as to stand in their

place, not only as respects the government of the college, but also as respects the maintenance of the college charter, it becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself, it appears, that about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation; and represented the expediency of appointing those whom he had by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power, by his last will, to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal,

which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is, perhaps, not very important, who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees, in England, were, in fact, the largest contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him, to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying, that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is then an eleemosynary, (1 Bl. Com. 471) and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity school, instructing the

Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When afterwards his school was enlarged, and the liberal contributions made in England and in America, enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public, for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it

was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a State instrument, than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason.

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration, of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable, or public spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design, securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument, which is to execute their designs, the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government,

created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and, also, that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace," &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College, as constituted by the charter. But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut River. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in

their place, and distributes their bounty, as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source, the corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount, collectively, to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention,

when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which, in their plain import, comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words which, in their natural import, include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power "to promote the progress of science and useful arts,

by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. They have, so far, withdrawn science and the useful arts, from the action of the State governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions, made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration, so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar, grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their

origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient, that the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock, in his will, were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives, of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the Revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock, is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion, that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed, that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *à priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution, which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers.

From the review of this charter, which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract, the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the State. But the constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act "impairing the obligation of contracts."

It has been already stated, that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one; gives the appointment of the additional members to the executive of the State, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of

this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear, that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors, with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear, that the Trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States, and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

WASHINGTON J. and STORY J. delivered opinions, concurring in the above result. Their opinions are reported both in Wheaton and in Farrar. JOHNSON J. and LIVINGSTON J. concurred. DUVAL J. dissented. TODD J. was absent.

SECTION II.

Extent of Police Power, where Charter does not contain any Express Reservation of Power.

THORPE v. RUTLAND AND BURLINGTON R. CO.

1855. 27 Vermont, 141.¹

ACTION ON THE CASE to recover damages for sheep of the plaintiff killed by one of the defendants' locomotives, upon their railroad track, where said sheep had escaped in consequence of there being no cattle-guard at a farm crossing, across the defendants' railroad on the plaintiff's land in Charlotte. The only question reserved at the trial in the county court was, whether the defendants were bound by the provision in the general railroad act of 1849, requiring railroad companies to construct and maintain cattle-guards;² there being no such obligation imposed upon the defendants by their charter, which was granted in 1843.

The county court, November Term, 1854, — PECK, J., presiding, — decided and instructed the jury that the defendants were bound by said provision, to which the defendants excepted.

D. A. Smalley, for defendants.

J. Maeck, for plaintiff.

REDFIELD, C. J. I. The present case involves the question of the right of the legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards at farm-crossings. No question could be made where

¹ Arguments omitted. — ED.

² Which is in these words: "Each railroad corporation shall erect and maintain fences on the lines of their road, . . . and also construct and maintain cattle-guards at all farm and road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon, if occasioned by want of such fences and cattle-guards." — (Comp. Stat. 200 § 41.)

such a requisition was contained in the charter of the corporation, or in the general laws of the state at the date of the charter. But where neither is the case, it is claimed that it is incompetent for the legislature to impose such an obligation by statute, subsequent to the date of the charter.

It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution of the United States, or of the particular state in question. I am not aware that the constitution of this state contains any restriction upon the legislature in regard to corporations, unless it be that where "any person's property is taken for the use of the public, the owner ought to receive an equivalent in money;" or that there is any such restriction in the United States constitution, except that prohibiting the states from "passing any law impairing the obligation of contracts."

It is a conceded point, upon all hands, that the parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters.

This extent of power is recognized in the case of *Dartmouth College v. Woodward*, 4 Wheaton 518, and the leading authorities are there referred to. Any requisite amount of authority, giving this unlimited power over corporations to the British parliament, may readily be found. And if, as we have shown, the several state legislatures have the same extent of legislative power, with the limitations named, the inviolability of these artificial bodies rests upon the same basis in the American states with that of natural persons, and there are, no doubt, many of the rights, powers, and functions of natural persons which do not come within legislative control. Such, for instance, as are purely and exclusively of private concern, and in which the body politic, as such, have no special interest. •

II. It being assumed, then, that the legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the general range of legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation, it becomes of primary importance to determine the extent to which the charter of a corporation may fairly be regarded as a contract within the meaning of the United States constitution.

Upon this subject, the decisions of the United States supreme court must be regarded as of paramount authority. And the case of *Dartmouth College v. Woodward*, being so much upon the very point now under consideration, and the leading case, and authoritative exposition of the court of last resort upon that subject, must be considered as the common starting point, the point of divergence, so to speak, of all the contrariety of opinion in regard to it.

Mr. Chief Justice MARSHALL there says, "a corporation is an artificial being—the mere creature of the law—it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." The decision throughout treats this as the fundamental idea, the pivot upon which the case turns. The charter of a corporation is thus regarded as a contract, inasmuch as it is an implied undertaking on the part of the state, that the corporation, as such, and for the purposes therein named or implied, shall enjoy the powers and franchises by its charter conferred. And any statute essentially modifying these corporate franchises is there regarded as a violation of the charter. But when we come to inquire what is meant by the franchises of a corporation, the principal difficulty arises. Certain things, it is agreed are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity, when the grant is unlimited; the power to sue and to be sued, to have a common seal and to contract; and in the case of a railroad, to have a common stock to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things, as incident to the beneficial use of these franchises, are necessarily implied. But there is a wide field of debateable ground outside of all these. It is conceded that the powers expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporations are inviolable.¹

But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to everything materially affecting their interest, and where there is no express reservation in their charters. It was upon this ground that a perpetual exemption from taxation was claimed in *Providence Bank v. Billings*, 4 Peters, 514, their charter being general, and no power of taxation reserved to the state. The argument was, that the right to tax either their property or their stock was not only an abridgment of the beneficial use of the franchise, but if it existed, was capable of being so exercised as virtually to destroy it. This was certainly plausible, and

¹ The supreme court of Ohio, in *Mechanics' and Traders' Bank v. Debolt*, 1 Ohio, 591, have even denied this, and in argument assume the right of the legislature to repeal the charter of banking corporations. So, also, in *Toledo Bank v. Bond*, *Ibid.*, 622. But these cases involve only the right of the legislature to grant away, permanently, for a consideration, the right of taxation, which seems to me not to involve the general question.

the court do not deny the liability to so exercise the power of taxation as to absorb the entire profits of the institution. But still they deny the exemption claimed. Chief Justice MARSHALL there says: "The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, *but must be expressed in it, or they do not exist.*"

This is sufficiently explicit, and upon examination will be found, I think, to have placed the matter upon its true basis. In reason, it would seem that no fault could be found with the rule here laid down by the great expounder of American constitutional law. As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground. And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.

To apply this rule to the present case, it must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the legislature, and can not be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States constitution. And if we suppose the legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do, *Moor v. Veasie*, 32 Maine 343; S. C. in error in the Sup. Ct. U. S., 4 Peters 568, it would scarcely be supposed that they thereby parted with any general legislative control over such person, or the business secured to him. Such a supposition, when applied to a single natural person, sounds almost absurd. But it must, in fact, be the same thing when applied to a corporation, however extensive. In either case, the privilege of running the road, and taking tolls, or fare and freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would no doubt be void. But beyond that, the entire power of the legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation, in consideration of a share of the profits, or a bonus, or the public duties assumed. And it has been questioned how far one legislature could, in this manner, abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. *Brewster v. Hough*, 10 New Hamp. 138; *Mechanics' and Traders' Bank v. Debolt*, 1 Ohio, 591; *Toledo Bank v. Bond*, *Ibid.*, 622. It seems to me there is some ground to question the right of the legislature to extinguish, by one act, this essential right of sovereignty. I would not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. *State of New Jersey v. Wilson*, 7 Cranch, 164; reaffirmed in *Gordon v. Appeal Tax Court*, 3 Howard, 133. But all the decisions

in the United States supreme court, allowing the legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and in the case of corporations, cotemporaneous with the creation of the franchise. *Richmond R. Co. v. The Louisa R. Co.*, 13 Howard, 71. Similar decisions in regard to the right of the legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the state, have been made by this court; *Herrick v. Randolph*, 13 Vt. 525; and in some of the other states, *Landon v. Litchfield*, 11 Conn. 251, and cases cited, *O'Donnell v. Bailey*, 24 Miss. 386. But these cases do not affect to justify even this express exemption from taxation being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the state received or stipulated for a consideration.

But in the present case the question arises upon the statute of 1850, requiring all railways in the state to make and maintain cattle-guards at farm crossings, and until they do so, making them liable for damage done to cattle by their engines, by reason of defect of fences or cattle-guards. The defendant's charter required them to fence their road, but no express provision is made in regard to cattle-guards. There is no pretense of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the act of incorporation, unless everything is implied by grant, which is not expressly inhibited, whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted. In addition to the cases already cited, we may here refer to the language of the opinion of GRIER, Justice, in *Richmond R. Co. v. Louisa R. Co.*, 13 Howard, 71, citing from the former decisions of the court with approbation, "that public grants are to be construed strictly, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is clearly given by the act." This being the definitive determination of the court of last resort, upon this subject, in so recent a case, should be regarded as final, if there be any such thing anywhere. And the language of TANEY, Chief Justice, in *Charles River Bridge v. Warren Bridge*, 11 Peters, 548, is still more specific, and in my judgment eminently just and conservative: "The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations." The conclusion of this learned judge and eminent jurist is, that no claim in any way abridging the most unlimited exercise of the legislative power over persons, natural or artificial, can be successfully asserted, except upon the basis of an express grant, in terms, or by necessary implication.

But upon the principle contended for in *Providence Bank v. Billings* (*supra*), and sometimes attempted to be maintained in favor of other corporations, most of the railways in this state would be quite beyond the control of the legislature, as well as to their own police, as that of the state generally. For in very few of their charters are these matters defined, or the control of them reserved to the legislature. Many of the charters do not require the roads to be fenced. But in *Quimby v. The Vermont Cent. R. Co.*, 23 Vt. 387, it was considered that the corporation were bound, as part of the compensation to land owners, either to build fences or pay for them. The same was also held in *Morse v. Boston and Maine R.*, 2 Cush. 536. Any other construction will enable railroad corporations to take land without adequate compensation, which is in violation of the state constitution, and would make the charter void to that extent. So, too, in regard to farm crossings, the charters of many roads are silent. And it has been held that the provision for restoring private ways does not apply to farm-crossings. But the railways, without exception, built farm-crossings, regarding them as an economical mode of reducing land damages, and they are now bound to maintain them, however the case might have been if none had been stipulated for, and the damages assessed accordingly. *Manning v. Eastern Counties Railway Co.*, 12 M. & W. 237. So, too, many of the charters are silent as to cattle-guards at road-crossings, but the roads generally acquiesced in their necessity, both for the security of property and persons upon the railroad and of cattle in the highway. For it has been held that this provision is for the protection of all cattle in the highway. *Fawcett v. The York and North Midland R. Co.*, 2 Law & Eq. 289; *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487. Thus making a distinction in regard to the extent of the liability of railways for damages arising through defect of fences, and farm-crossings, and cattle-guards, at those points, and those which arise from defect of fences, and cattle-guards at road-crossings, the former being only for the protection of cattle, rightfully in the adjoining fields, as was held in *Jackson v. R. & B. R. Co.*, 25 Vt. 150, and the other for the protection of all cattle in the highway, unless perhaps, in some excepted cases, amounting to gross negligence in the owners. And there can be no doubt of the perfect right of the legislature to make the same distinction in regard to the extent of the liability of railways in the act of 1850, if such was their purpose, which thus becomes a matter of construction.

But the present case resolves itself into the narrow question of the right of the legislature, by general statute to require all railways, whether now in operation, or hereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road-crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. It might be contended that cattle-guards are a necessary part of the fence at all crossings, but that has been questioned, and we think the matter should be decided upon

the general ground. It was supposed that the question was settled by this court, in *Nelson v. V. & C. R. Co.*, 26 Vt. 717. The general views of the court are there stated as clearly as it could now be done, but as the general question is of vast importance, both to the roads and the public, and has again been urged upon our consideration, we have examined it very much in detail.

We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states, and which is, by the fifth article of the bill of rights of this state, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is, of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would.

This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature, is two-fold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the state to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required

to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

There would be no end of illustrations upon this subject, which, in the detail are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. *Hegeman v. Western R. Co.*, 16 Barbour, 353.

2. There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to virtual destruction by the legislature; and 2. That it is an attempt to control the obligation of one person to another, in matters of merely private concern.

The first point has already been somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use. *Armington v. Barnet*, 15 Vt. 745; *West River Bridge Co. v. Dix*, 16 Vt. 446; S. C. in error in the United States Sup. Ct.; 6 Howard, 507; 1 Shelford (Bennett's ed.) 441, and cases cited.

All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of *Dartmouth College v. Woodward* was decided, and which every well considered case in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railroads, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. Many analogous subjects may be adduced to show the right of legislative control over matters chiefly of private concern. It was held, that a statute making the stockholders of existing banks liable for the debts of the bank was a valid law as to debts thereafter contracted, and binding to that extent, upon all stockholders, subsequent to the passage of the law. *Stanley*

v. *Stanley*, 26 Maine, 191. But where a bank was chartered with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, and a statute of the state subsequently made it unlawful for any bank in the state to transfer by endorsement or otherwise, any bill or note, etc., it was held that the act was void, as a violation of the contract of the state with the bank in granting its charter. *Planters' Bank v. Sharp*, and *Baldwin v. Payne*, 6 Howard, 301, 326, 327, 332; *Jameson v. Planters' and Merchants' Bank*, 23 Alabama, 168. It is true that any statute destroying the business or profits of a bank, and equally of a railroad, is void. Hence a statute prohibiting banks from taking interest, or discounting bills or notes, would be void, as striking at the very foundation of the general objects and beneficial purposes of the charter. But a general statute reducing the rate of interest, or punishing usury, or prohibiting speculations in exchange or in depreciated paper, or the issuing of bills of a given denomination, or creating other banks in the same vicinity, have always been regarded as valid. And while it is conceded the legislature could not prohibit existing railways from carrying freight or passengers, it is believed that beyond all question, it may so regulate these matters as to impose new obligations and restrictions upon these roads materially affecting their profits, as by not allowing them to run in an unsafe condition, as was held as to turnpikes, *State v. Bosworth*, 13 Vt. 402. But a law allowing certain classes of persons to go toll free is void, *Pingrey v. Washburn*, 1 Aiken, 268. So, too, chartering a railroad along the same route of a turnpike is no violation of its rights, *White River Turnpike Co. v. Vermont Cent. R. Co.*, 21 Vt., 590; *Turnpike Co. v. Railway Co.*, 10 Gill & Johnson, 392; or chartering another railway along the same route of a former one, to whom no exclusive rights are granted in terms, *Matter of Hamilton Avenue*, 14 Barbour, 405; or the establishment of a free way by the side of a toll bridge, *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

The legislature may, no doubt, prohibit railroads from carrying freight which is regarded as detrimental to the public health or morals, or the public safety generally, or they might probably be made liable as insurers of the lives and limbs of passengers as they virtually are of freight. The late statute, giving relatives the right to recover damages where a person is killed, has wrought a very important change in the liability of railways, ten times as much, probably, as the one now under consideration ever could do. And I never knew the right of the legislature to impose the liability to be brought in question.

But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard

to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or to be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the state, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the state legislature have created a corporation for manufacturing powder at a given point, at the time, remote from inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed, or secured from doing harm, at the sole expense of such corporation. This very point is, in effect, decided in regard to Trinity churchyard, which is a royal grant for interment, securing fees to the proprietors, in the case of *Coates v. The City of New York*, 7 Cowen, 604; and in regard to *The Presbyterian Churchyard* in their case v. *The City of New York*, 5 Cowen, 538.

So, too, a statute requiring division fences between adjoining land proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons and equally corporations. But a statute requiring land owners to build *all their fences* of a given quality or height, would no doubt be invalid, as an unwarrantable interference with matters of exclusively private concern. But the farm-crossings upon a railway are by no means of this character. They are division fences between adjoining occupants, to all intents. In addition to this, they are the safeguards which one person, in the exercise of a dangerous business, is required to maintain in order to prevent the liability to injure his neighbor. This is a control by legislative action coming within the obligation of the maxim, *Sic utere tuo*, and which has always been exercised in this manner in all free states, in regard to those whose business is dangerous and destructive to other persons, property or business. Slaughter-houses, powder-mills, or houses for keeping powder, unhealthy manufactories, the keeping of wild animals, and even domestic animals, dangerous to persons or property, have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied.

I do not now perceive any just ground to question the right of the legislature to make railways liable for all cattle killed by their trains. It might be unjust or unreasonable, but none the less competent. *Girtman v. Central Railroad*, 1 Kelly, (Georgia) 173, is sometimes

quoted as having held a different doctrine, but no such point is to be found in the case. The British parliament for centuries, and most of the American legislatures, have made the protection of the lives of domestic animals, the subject of penal enactment. It would be wonderful if they could not do the same as to railways or if they could not punish the killing, by requiring them to compensate the owner, or, as in the present case, to do it until they used certain precautions in running their trains, to wit, maintained cattle-guards at roads and farm-crossings.

There are some few cases in the American courts bearing more directly upon the very point before us. In *Suydam v. Moore*, 8 Barbour, 358, the very same point is decided against the railway; WILLARD, J., compares the requirement to the law of the road, the passing of canal boats, and keeping lights at a given elevation in steamboats, and says it comes clearly within the maxim *Sic utere tuo*; and in *Waldron v. The Rensselaer & Saratoga R. Co.*, *Ibid.* 390, the same point is decided, and the same judge says the requirements of the new act, which is identical with our statute of 1850, as applied to existing railways, "are not inconsistent with their charter, and are, in our judgment, such as the legislature had the right to make." They were designed for the public safety, as well as the protection of property. In *Milliman v. The Oswego & Syracuse R.*, 10 Barbour, 87, the ground is assumed that the new law was not intended to apply to existing roads. And no doubt is here intimated of the right of the legislature to impose similar regulations upon existing railways. The N. Y. Revised Statutes subject all corporate charters to the control of the legislature, but it has been there considered, that this reservation does not extend to matters of this kind, but that the right depends upon general legislative authority. The case of *The Galena and Chicago Union R. Co. v. Loomis*, 13 Illinois, 548, decides the point that the legislature may pass a law, requiring all railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade. The court say, "The legislature has the power, by general laws, from time to time as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with, or impairs the powers conferred on the defendants in their act of incorporation." All farm-crossings in England are required to be above or below grade, so as not to endanger passengers upon the road, and so of all road-crossings there, unless protected by gates. I could entertain no doubt of the right of the legislature to require the same here as to all railways, or even to subject their operations to the control of a board of commissioners, as has been done in some states. In *Benson v. New York City*, 10 Barbour, 223, it was held, that a ferry, the grant to which was held, not under the authority of the state, but from the city of New York, and which was a private

corporation, as to the stock, might be required by the legislature to conform to such regulations, restrictions and precautions as were deemed necessary for the public benefit and security. The opinion of WOODBURY, Justice, in *East Hartford v. Hartford Bridge Co.*, 10 Howard, 511, assumes similar grounds, although that case was somewhat different. The case of *Swan v. Williamson*, 2 Michigan, 427, denies that railways are private corporations. But that proposition is scarcely maintainable so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be. The language of MARSHALL, Chief Justice, in *Dartmouth College v. Woodward*, 4 Wheaton, 518, 629, seems pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts; "That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." And equally pertinent is the commentary of Parsons on Contracts, 2 vol. 511, upon the provision of the United States constitution in relation to the obligation of contracts. "We may say that it is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the legislature of a state may at any time deem expedient."

We conclude, then, that the authority of the legislature to make the requirement of existing railways may be vindicated, because it comes fairly within the police of the state; 2. Because it regards the division fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons. Judgment affirmed.¹

BENNETT, J., dissenting.

BOSTON BEER COMPANY v. MASSACHUSETTS.

1877. 97 U. S. 25.²

ERROR to the Superior Court of the Commonwealth of Massachusetts. This was a proceeding in the Superior Court of Suffolk County, Massachusetts, for the forfeiture of certain malt liquors, belonging

¹ A note, referring to authorities on "analogous subjects," is omitted. — Ed.

² Arguments and portions of opinion omitted. — Ed.

to the Boston Beer Company, and which had been seized as it was transporting them to its place of business in said county, with intent there to sell them in violation of an act of the legislature of Massachusetts, passed June 19, 1869, c. 415, commonly known as the Prohibitory Liquor Law. The company claimed that, under its charter, granted in 1828, it had the right to manufacture and sell said liquors; and that said law impaired the obligation of the contract contained in that charter, and was void; so far as the liquors in question were concerned. The court refused to charge the jury to that effect, and a verdict was found against the claimant. The rulings of the Superior Court having been affirmed by the Supreme Judicial Court of the Commonwealth, the company brought the case here. The statutes of Massachusetts bearing on the case are referred to in the opinion of the court.

H. W. Paine and *F. O. Prince*, for plaintiff in error.

Charles R. Train, for defendant in error.

BRADLEY, J. The question raised in this case is, whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit.

As before stated, the charter of the plaintiff in error was granted in 1828, by an act of the legislature passed on the 1st of February in that year, entitled "An Act to incorporate the Boston Beer Company." This act consisted of two sections. By the first, it was enacted that certain persons (named), their successors and assigns, "be, and they hereby are, made a corporation, by the name of The Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements, contained in an act passed on the third day of March, A.D. 1809, entitled 'An Act defining the general powers and duties of manufacturing corporations,' and the several acts in addition thereto." The second section gave the company power to hold such real and personal property to certain amounts, as might be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

The general manufacturing act of 1809, referred to in the charter, had this clause, as a proviso of the seventh section thereof: "*Provided always*, that the legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient."

[The company contended that the power reserved to the legislature in the Act of 1809 was revoked or surrendered by a subsequent Act,

passed in 1829. The learned Judge held, that this contention could not be sustained. The opinion then proceeds as follows :]

If this view is correct, the legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

But there is another question in the case, which, as it seems to us, is equally decisive.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true ; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor ; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Burtemeyer v. Iowa* (18 Wall. 129), was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer for ever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex* ; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645.

Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Of course, we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several States, or otherwise. *Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 504; *Passenger Cases*, 7 id. 283; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, id. 275; *Railroad Company v. Husen*, 95 id. 465. That question does not arise in this case.

Judgment affirmed.

CHICAGO, BURLINGTON, AND QUINCY R. R. CO. v. IOWA.

1876. 94 U. S. 155.¹

APPEAL from the Circuit Court of the United States for the District of Iowa.

This bill was filed by the Chicago, Burlington, and Quincy Railroad Company, a corporation created by the laws of Illinois, for an injunction restraining the Attorney-General of the State of Iowa from prosecuting suits against it or its officers, under the provisions of an act passed by the legislature of Iowa, entitled "An Act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this State," approved March 23, 1874.

The complainant is the lessee of the Burlington and Missouri River Railroad in the State of Iowa; the two roads being connected by a bridge which crosses the Mississippi River at Burlington, thus making a continuous and uninterrupted line of railroad from Chicago, Ill., to Plattsmouth, on the Missouri River, Iowa.

In constructing its road, the Burlington and Missouri River Railroad Company executed sundry mortgages upon its property, &c., which are still outstanding.

On Dec. 31, 1872, that company leased its road and branches, with all their fixtures, appurtenances, and equipments of every kind, and all their franchises and privileges, to the complainant in perpetuity, and delivered possession thereof.

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

By the lease, the complainant covenanted among other things to pay all the indebtedness, both principal and interest, of the lessor corporation; and also to make to the stockholders of the lessor corporation the same amount of dividends per share that it should make to its own stockholders.

The complainant claims, that, under the provisions of the laws of Iowa, which existed and were in force when the Burlington and Missouri River Railroad Company was organized, and when the money with which its road and branches were built and equipped, was borrowed, and the mortgages to secure the payment thereof were executed, the company had the right to fix, determine, and establish the tariff of rates, for the transportation of freight and passengers over its road and branches, and that it has always heretofore exercised that right, without question of its power and authority to do so; that this right, power, and privilege were, by the lease aforesaid, assigned, set over, and transferred to the complainant, and that it has, ever since the lease, exercised the power, without question of its right to do so; that, in the exercise of such power, it has fixed and adjusted the tariff of charges for the transportation of persons and property over the road and branches, with a view to furnishing to the country the greatest facilities of transportation, and at the lowest rates, compatible with the duty of the complainant to keep the roads in good condition and repair, and provided with the necessary depots, freight-houses, machine-shops, engines, cars, &c., to meet the demands of business, and to provide the means of defraying the expenses of operating the roads, paying the interest upon the indebtedness, and earning reasonable dividends for the stockholders; and that the earnings of the roads, under the operation of the tariff so established, have been barely adequate, under careful and economical management, to such purposes; and that these ends cannot be attained if the complainant shall be deprived of its just and lawful right to fix its tariff of charges, and be compelled to conform to the act in question.

The answer, so far as material to the present purpose, admits most of the allegations of the bill, but denies that the Burlington and Missouri River Railroad Company, either by the charter or the laws of Iowa, had the exclusive right and power to fix its rates of fare, and denies that any attempt is to be made to enforce the law, so far as regards inter-state commerce.

On hearing, the court rendered a decree denying the injunction, and dismissing the bill; from which decree complainant appealed.

O. H. Browning and F. T. Frelinghuysen, for appellant.

M. E. Cutts, Attorney-General of Iowa, *contra*.

WAITE, C. J. Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn v. Illinois*, *supra*, p. 113, subject to legis-

lative control as to their rates of fare and freight, unless protected by their charters.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington, and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the general assembly of Iowa might from time to time enact and provide. This is, in substance, its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it.

This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no

longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before.

The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in inter-state commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

It remains only to consider whether the statute is in conflict with sect. 4, art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires.

[Omitting remainder of opinion.]

Decree affirmed.

Mr. JUSTICE FIELD and Mr. JUSTICE STRONG dissented.

REAGAN v. FARMERS' LOAN AND TRUST CO.

1894. 154 U. S. 362.¹

APPEAL from U. S. Circuit Court for Western District of Texas.

Bill in equity, filed April 30, 1892, by the Farmers' Loan and Trust Company, trustee in a trust deed, executed by the International & Great Northern R. R. Company, on June 15, 1881, to secure a second series of bonds. The defendants are Reagan, McLean, and Foster, railroad commissioners of the State of Texas, Culberson, attorney general of Texas, the aforesaid R. R. Company, and Campbell, receiver of the Company.

April 3, 1891, the legislature of Texas passed an act establishing a railroad commission with power to regulate rates for transportation. Reagan *et als.* were appointed commissioners under this act, and proceeded to establish rates. The plaintiffs, thereupon, filed the present bill, alleging that the rates were unreasonable and unjust, and setting forth specific facts in support of such allegation. The bill prayed (*inter alia*) for a decree restraining the commissioners and the attorney general from enforcing the rates. The International & G. N. R. Co. filed a cross bill, praying for substantially the same relief. The commissioners and the attorney general at first filed answers; but, after some testimony had been taken, they withdrew their answers and filed demurrers.

The Circuit Court made a decree enjoining the enforcement of the rates. From this decree the commissioners and the attorney general appealed.

Charles A. Culberson, Attorney General of Texas, for appellants.

John F. Dillon and *E. B. Kruttschnitt* (*Herbert B. Turner* and *John J. McCook* with them), for appellee.

BREWER, J.

Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation. *Railroad Commission Cases*, 116 U. S. 307. No valid objection, therefore, can be made on account of the general features of this act; those by which the State has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the State.

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In *Chicago, Burlington & Quincy Railroad v. Iowa*, 94 U. S. 155, and *Peik v. Chicago & Northwestern Railway*, 94 U. S. 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller, in *Wabash &c. Railway v. Illinois*, 118 U. S. 557, 569, in respect to those cases:

“The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges.”

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S. 307, 331, and while the right of control was re-affirmed a limitation on that right was plainly intimated in the following words of the Chief Justice:

“From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent

of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of *Dow v. Beidelman*, 125 U. S. 680, 689. Again, in *Chicago & St. Paul Railway v. Minnesota*, 134 U. S. 418, 458, it was said by Mr. Justice Blatchford, speaking for the majority of the court:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in *Chicago & Grand Trunk Railway v. Wellman*, 143 U. S. 339, 344, is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. New York, 143 U. S. 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us, the records do not show that the charges fixed by the statute are unreasonable." Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and

not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc.; it is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass, then, to the remaining question. Were the rates, as prescribed by the commission, unjust and unreasonable? The bill, it will be remembered, was filed by a second mortgagee. The railroad company was made a defendant and filed a cross-bill.

[The learned judge then discussed the general averments of these bills, that the rates were unjust and unreasonable; and also the special facts disclosed in the several bills.]

And now, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000; it cannot be replaced today for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have

never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over \$150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has

never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

It follows from these considerations that the decree as entered must be reversed in so far as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided.

EAGLE INSURANCE CO. v. OHIO.

1894. 153 U. S. 446.¹

ERROR to the Supreme Court of the State of Ohio.

The Insurance Company, plaintiff in error, was incorporated on March 22, 1850, by an act of the General Assembly of Ohio, 48 Ohio Laws, 498. Sections 3654 and 3655 of the Revised Statutes of Ohio, [enacted subsequently to the charter], require, in substance, that the officers of each insurance company, organized under any law of the State, shall annually furnish statements of the condition of the company in numerous specified particulars, concerning assets, liabilities, expenditures, dividends, policies in force, &c. The statute prescribes penalties for non-compliance.

Under these sections proper blanks were furnished to the company by the State Superintendent of Insurance, and on its refusal to make the returns required by law, proceedings by mandamus were begun against it. The defence was that the above provisions impaired the obligation of the contract which grew out of its charter. Upon the decision of the Supreme Court of the State making the writ peremptory, the case was brought here by writ of error.

Thomas H. Kelly (*John F. Follett* with him), for plaintiffs in error.

J. K. Richards, Attorney General of Ohio, filed a brief for defendant in error, but the court declined to hear him.

WHITE, J. [After stating the case.] The only question presented is whether or not the charter of the plaintiff in error exempted it from

¹ Statement abridged. — Ed.

obligation to comply with the subsequently established police regulations of the State, contained in sections 3654 and 3655 of the Revised Statutes of Ohio. This subject was fully considered by this court in the case of *The Chicago Life Insurance Company v. Needles*, 113 U. S. 574. There the company had been chartered by the State of Illinois to carry on a life insurance business, and the question was whether subsequently enacted police regulations of that State for the inspection of such business, and for the liquidation thereof, in the event of insolvency, could be enforced against a corporation working under a prior charter without impairing the obligation of the contract. The statute considered in the *Needles case* authorized the Auditor, whenever the actual funds of any life insurance company doing business in the State were not of a net value equal to the net value of its policies, according to the "combined experience" or "actuaries" rate of mortality, with interest at four per cent, to give notice to such company and its agent to discontinue issuing policies in the State until such time as its funds should become equal to its liabilities, valuing its policies as aforesaid. The law, in addition, required every life insurance company incorporated in Illinois to transmit to the Auditor on or before the 1st day of March in each year a sworn statement of its business standing and affairs, in the form prescribed and authorized by law. It also empowered the officer to address inquiries to any company in relation to its "doings and condition," and any other matter connected with its transactions, which inquiries, it provided, should be "promptly answered;" and it imposed upon him the duty of making an examination of the condition and affairs of any company, whenever he deemed it expedient to do so, and had reason to suspect the correctness of any annual statement, or that the company was in an unsound condition. By another statute it was provided that if, upon examination of the affairs of any insurance company, the Auditor should conclude that it was insolvent, or that its further continuance in business would be hazardous to the insured or the public, he should apply by petition to the judge of any Circuit Court for an injunction restraining the company from proceeding with its business until further hearing, etc. Upon the case as thus presented, the court said:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained consistently with the power which the State has, and, upon every ground of public policy, must always have over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the

company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor*, 9 Cranch, 43, 51; Angell & Ames on Corporations, 9th ed. paragraph 774, note.

"Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 68, 70; *Commonwealth v. Farmers' & Mechanics' Bank*, 21 Pick. 542; *Commercial Bank v. Mississippi*, 4 Sm. & Marsh. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

These views are decisive of the issue here. An attempt is made to distinguish that case from this upon the ground that, in the former, the proceedings were for the purpose of compelling the company to cease from business because of insolvency; while, in this case, the question is as to the obligation of the company to make the statements required by the statute. This distinction is without foundation. In the *Needles case*, the duty was expressly imposed upon the corporation to make statements identical in form and substance with those which insurance companies are required to make under the Ohio statute we are here considering. Many additional police powers were conferred by the Illinois law, among them being the authority which, as stated above, was given to the State Auditor to apply for an injunction restraining a company from continuing its business, whenever, by its statement, it appeared to him to be insolvent. It is, indeed, true that the relief there invoked was the restraint of the corporation from doing business on the ground of insolvency. But that case substantially involved not only the right

to compel the statement, but the greater right to prevent, in case of insolvency, the continuance of the business of the corporation. Hence, as the greater includes the less, the *Needles case* necessarily embraces every issue presented here.

Another contention is that compliance with the provisions in regard to statements of its business would bring the company under the operation of the general law of the State relating to corporations, and thus place it in the position of voluntarily subjecting itself to many provisions which would, if applied, impair the obligations of the charter. In March, 1892, (89 Ohio Laws, 73,) the General Assembly of Ohio specifically enacted that any fire insurance company which should comply with the requirements of sections 3654 and 3655, or any other police regulations contained in Chapter XI of the title relating to corporations, and Chapter VIII, Title 3, Part 1, of the Revised Statutes of Ohio, relating to the insurance department of the State, "shall not be deemed to have consented to and shall not be affected by the provisions" of the title relating to corporations.

The judgment of the Supreme Court of Ohio in the case before us expressly finds that, under the operation of this last provision, the plaintiff in error would not subject its charter to any conditions or modifications by making the statement which it now refuses to submit.

Judgment affirmed.

SECTION III.

Reserved Power in Legislature to repeal Charter.

READ v. FRANKFORT BANK.

1843. 23 *Maine*, 318.

ASSUMPSIT against the defendants as indorsers of two promissory notes. The plaintiffs introduced the proof necessary to charge the defendants as indorsers.

The defendants thereupon contended that the action could not be maintained by reason of the provisions of the additional act of April 16, 1841, repealing the charter of the Frankfort Bank, which required all claims to be presented and proved before the receivers, appointed to take charge of the effects of the bank, prior to July 1, 1842, as it had not been shown, that the plaintiffs had complied with such provision. The plaintiffs then proved, that the action was commenced Feb. 2, 1841, and that property was attached on the same day. And that on June 17, 1841, a copy of the writ was duly served upon the receivers.

SHEPLEY J. who presided at the trial, ruled that the service of the writ upon the receivers was not such presentation of the claim and proof, as the statute required, and that the action could not be maintained. The plaintiffs filed exceptions.

Lathaway and *Hubbard*, for the plaintiffs, contended that as the action was commenced before the repeal of the charter, and the debt secured by an attachment of property, their right became vested, and that the legislature had no constitutional power to pass acts affecting their rights injuriously. Metc. & P. Dig. 555 ; 8 Mass. R. 43 ; 2 Gallis. 141 ; 2 Greenl. 294 ; 3 Greenl. 326 ; Story's Com. on Const. c. 34.

They also contended, that the service of the writ upon the receivers was in substance a compliance with the requirements of the statute in relation to proof of the claim.

W. Kelley and *Merrill*, in the defence, said that the legislature reserved in the charter the right to repeal it, on the happening of a certain event, which it is admitted has taken place in this case. This is clearly a constitutional act. When the corporation ceased to exist, the action was gone. This is decisive against the present case. The legislature, however, did provide a remedy by taking possession of the effects of the corporation, and making an equal distribution thereof among all the creditors, who would bring in and prove their debts. The plaintiffs have less ground for setting up a claim to vested rights, than the creditor who has attached the property of an insolvent man, who dies during the pendency of the suit.

Merely giving the receivers notice of the suit, cannot be considered as presenting and proving the claim.

The opinion of the Court was prepared by

TENNEY J. — By the statute of March 29, 1841, c. 139, the act incorporating the Frankfort Bank was repealed, and provision made for the appointment of receivers, who were required, when qualified to act, to demand and receive of the officers of the Bank the property to the same belonging. On the 16th of April, 1841, an additional act was passed requiring all creditors, in order to entitle themselves to a distributive share of the assets, and to prevent their claims from being barred, to exhibit and prove them to the receivers on or before the first day of July, 1842.

This action was commenced and an attachment of property made previous to the repeal of the charter of the Bank ; and it is insisted that thereby a right became vested in the plaintiffs to proceed with the suit under the laws, which were in force at the time of its commencement, and that the same cannot constitutionally be affected injuriously by any act of the legislature. But if the repeal was not in contravention of the constitution, it is contended that the plaintiffs have substantially complied with the statute of the 16th of April by causing a copy of the writ to be served on the receivers on the 17th of June, 1841, a time long before that, when the claim was to have been barred, if the same had not been exhibited and proved to the receivers.

By the act of 1831, c. 519, entitled "an act to regulate Banks and Banking," § 32, the legislature reserved to themselves, in cases therein named, after certain proceedings, the right to declare charters of Banks forfeit and void. The Frankfort Bank, incorporated after the enactment of this statute, was subject to its provisions, which were a part of its charter. It is not contended that the Bank had not exposed itself, so that its charter was properly revoked, or that all the necessary steps were not taken by the legislature agreeably to the general statute of 1831, previous to the repealing act; and in default of evidence to the contrary, it must be so presumed. Neither is it contended, that the Bank did not submit to the provisions of the repealing statute, acknowledged the authority of the receivers, and surrendered to them its books and its property.

After this, the creditors of the Bank cannot object to the constitutionality of the Act, dissolving the corporation, when it was done for causes, which by the charter were sufficient for the purpose, and when the repeal was conclusive upon the Bank. Indeed, it is not seen how *any* objection can be made by those, who had no other connexion therewith, than that of being its creditors. Whoever entered into contracts with it, exposed himself to losses which might arise from its dissolution, as he would with natural persons, by their death. No security was provided in the charter, or other statute, against such an exposure to injury.

The Bank having ceased to exist, excepting so far that the receivers could prosecute any suit pending in its name; and could use the name of the Bank in any suit, which might be necessary to enable them to collect any of the debts due to the Bank, there is no party whom the plaintiff can prosecute or take judgment or execution against, unless it be in a court of equity. The Bank as such have no longer the power to sue or to be sued; the receivers alone are the successors of the corporation, and they take all the property for the purposes specified in the act of repeal, and for those purposes only. Their appointment and the power given to them in no wise infringe the previously existing rights of the plaintiffs. It is by and through them, that the property is to be made available in the payment of the debts against the Bank. If the receivers had not been appointed, the plaintiffs could have no better prosecuted their suit, than they are now able to do. The repeal of the charter has presented the obstacle to their further proceedings, by dissolving the party against whom they had commenced them.

The obligation of the contract between the plaintiffs and the Bank was not impaired by the repeal of its charter, but the mode of obtaining indemnity for its violation was changed. The bank was created by the legislature, and by the charter, there was no provision made for the prosecution of suits against it, if that charter should be declared by the same power forfeit and void; but a mode has been provided in the repealing act, by which creditors are enabled to obtain satisfaction for their claims, to the extent of the means existing therefor. A remedy

for a party may be changed or wholly taken away by the legislature without contravening the constitution of the United States. *Thayer v. Searey*, 2 Fairf. 284; *Oriental Bank v. Freese*, 18 Maine R. 109. And such a change may constitutionally affect suits pending at the time, when it is made.

Have the plaintiffs saved themselves from the operation of the limitation contained in the act of April 16, 1841? We are satisfied, that they have not; though we do not perceive how a decision of that question can influence this case. For if we have taken the correct view of the effect of the act of repeal, this action can be no farther prosecuted, in any court. The claim of the plaintiffs in this case is upon two notes of hand indorsed by the Bank. The writ was the legal process to obtain a judgment upon this claim. In order to bring the affairs of the Bank to a close within the time prescribed, the receivers were to be made satisfied of the existence of the demands and the legal title of the claimants to payment. The writ could not tend in the least to do either, and the service of the same by a copy, was not such an act as to take the case from the effect of the limitation.

Nonsuit confirmed.

ERIE AND NORTH-EAST R. CO. v. CASEY.

1856. 26 Pa. State, 287.¹

BILL in equity, filed by the Erie and North-East R. Co. to restrain the defendant from taking possession of the railroad of plaintiff company.

The charter of the R. R. Co., granted in 1842, contained a provision, that "if the said company misuse, or abuse any of the privileges hereby granted, the legislature may resume the rights and privileges hereby granted to the said company."

In 1855, the legislature passed an act, repealing and annulling the charter of the company, and authorizing the Governor to appoint one or more persons to take and have the charge and custody of the said railroad. The defendant Casey was appointed by the Governor under this act, and was about to take possession of the road.

The plaintiffs thereupon filed the present bill; which prayed for a special injunction and for further relief.

On Jan. 9, 1856, the rule for a special injunction was heard on the bill, and special affidavits and exhibits, before the court in banc.

St. G. T. Campbell and *Meredith* (*Stanton* and *Hurst* with them), for plaintiffs.

Casey and *Thompson*, for respondent.

¹ Statement abridged. Arguments and portions of opinions omitted. — Ed.

BLACK, J. [After overruling other objections to the validity of the repealing act.]

The authority given by the Act of October, 1855, to the defendant to take possession of the railroad is asserted by the plaintiff's counsel to be an act of confiscation — a taking of private property for public use without compensation. If this be true, the injunction ought to be awarded; for no legislature can do such a thing under our constitution. When a corporation is dissolved by a repeal of its charter, the legislature may appoint, or authorize the governor to appoint a person to take charge of its assets for the use of the creditors and stockholders; and this is not confiscation, any more than it is confiscation to appoint an administrator to a dead man, or a committee for a lunatic. But money, or goods, or lands, which are or were the private property of a defunct corporation, cannot be arbitrarily seized for the use of the state without compensation paid or provided for. This act, however, takes nothing but the road. Is that private property? Certainly not! It is a public highway, solemnly devoted by law to the public use. When the lands were taken to build it on they were taken for public use; otherwise they could not have been taken at all. It is true the plaintiffs had a right to take tolls from all who travelled or carried freight on it, according to certain rates fixed in the charter, but that was a mere franchise; a privilege derived entirely from the charter, and it was gone when the charter was repealed. The state may grant to a corporation, or to an individual, the franchise of taking tolls on any highway, opened or to be opened, whether it be a railroad or river, canal or bridge, turnpike or common road. When the franchise ceases by its own limitation, by forfeiture or by repeal, the highway is thrown back on the hands of the state, and it becomes her duty, as the sovereign guardian of the public rights and interests, to take care of it. She may renew the franchise, give it to some other person, exercise it herself, or declare the highway open and free to all the people. If the railway itself was the private property of the stockholders, then it remains theirs and they may use it without a charter as other people use their own — run it on their own account — charge what tolls they please — close it or open it when they think proper — disregard every interest except their own. The repeal of charters on such terms would be courted by every railroad company in the state; for it would have no effect but to emancipate them from the control of law, and convert their limited privileges into a broad, unbounded license. On this principle, a corporation might be rewarded, but never punished, for misconduct. Repeal of its charter, instead of bringing it to a shameful end, would put “length of days in its right hand, and in its left hand riches and honour.” But it is not so. Railroads made by the authority of the Commonwealth upon land taken under her right of eminent domain, and established by her laws as thoroughfares for the commerce that passes through her borders, are her highways. No corporation has any property in them, though corporations may have franchises annexed to and exercisable within them.

Such a franchise the plaintiffs had, but they have it no longer. The right to take tolls on a road is an incorporeal hereditament, which may be granted to a corporation or to an individual, and the grantee has an estate in the franchise. But what estate? The estate endures for ever if the charter be perpetual; for years, if it be given for a limited period; and at will, if it be repealable at the pleasure of the legislature. This corporation, after its privileges were abused, had an estate at will, and the Commonwealth chose to demand repossession. That terminated the estate as completely as an estate for years would be terminated after the expiration of the term. The grant was exhausted, the corporation lived its time out. Its lease of life was expressly limited, at the day of its creation, to the period when the legislature should dissolve it for misconduct. When the legislative will was spoken, its hour had come. Having no right to keep the franchises any longer, it would be absurd to claim compensation for taking them away. To say that the stockholders have a right to compensation for the franchises, because they are wrongfully taken, and that they were wrongfully taken because they have a right to compensation, would be reasoning in a very vicious circle. If the stockholders had a right to retain the franchises, the charter could not be repealed at all, with or without compensation. If they had no right to retain them, they have no claim to compensation.

A brief recapitulation of the main points in the case may serve to make the grounds of our judgment somewhat plainer.

I. This charter was granted with a reservation of the right to repeal it, if the franchises should be abused or misused.

II. We are satisfied that, in point of fact, those franchises were abused and misused.

III. After that event happened, the General Assembly was invested with full power to repeal the charter, and the corporators held their franchises from the state merely as tenants at will, in the same manner as if there had been an unconditional reservation of the right to repeal.

IV. After the interest of the corporators had been thus cut down by their own misconduct to an estate at will, the legislature only could enlarge the charter, so as to make it a perpetual grant, or put the corporators on another term of probation.

V. The judicial proceedings against the corporation did not and could not disarm the legislature of its reserved right to repeal, nor enlarge the estate of the corporation in its franchises, nor change the terms of the original grant, for these are things which the judiciary cannot do, nor the executive either.

VI. The power of the legislature is not restricted by the rules of pleading and evidence which the courts have adopted; and therefore the state may act in the legislature upon a truth which she would have been estopped to show in a court if the legislature had not interfered.

VII. The power to repeal for abuse of corporate privileges is a different right from that of demanding a judicial sentence of forfeiture,

and is reserved for the very reason that it may afford a remedy when a *quo warranto* would not.

VIII. The charter being constitutionally repealed, the franchises are, as a necessary consequence, resumed to the state, and the road remains what it always was — public property.

IX. The corporators cannot be entitled to compensation, for they had no property in the road, and after their default they held the corporate franchises, at the will of the legislature, and the exertion of that will, in the resumption of the franchises, did them no injury but what they agreed to submit to.

The injunction which the plaintiffs have moved for is to be refused.

LOWRIE J. and KNOX J. delivered concurring opinions.

LEWIS C. J. and WOODWARD J. delivered dissenting opinions [which are reported in 1 Grant's Pennsylvania Cases, 274-301]. From these opinions, the following extracts are made.

LEWIS C. J. But the Act of 1855 bears upon its face decisive evidence, that other objects were in contemplation than the mere nullification of the charter. It provides for taking possession of the railroad, keeping it in good running order for the accommodation of the public travel and business, collecting the revenues and disposing of them as the legislature may hereafter declare, subject to any rights or obligations which may exist. It also provides for restoring the possession of the road to the company, if they shall break up the connection at present existing with the western road — extend their road to the harbor of Erie and terminate it at that point, and change the gauge throughout the whole length of it, either to four feet eight and a half inches, or six feet, and maintain the same thereat. These are burthens which the charter did not authorize the legislature to impose. That the termination at the harbor would greatly increase the expenditures of the corporators, and materially impair the usefulness of the road for the purpose for which it was designed is perfectly manifest. That this is the principal object of the act is too evident to escape observation; and that it is imposing a ruinous burthen, not warranted by a single word in the charter, is equally clear.

If the corporation refuses to comply with the conditions proposed by the Act, what is to become of the railroad? It must be remembered that the State is acting under a *reservation*, not a *grant* of power. It is the very essence of a reservation that it can operate only upon the powers existing before in the party making it. It has no effect whatever upon rights which previously existed in the opposite party, or were afterwards acquired by his labor and money expended on the faith of the grant. The powers existing in the State before the charter were merely the privileges granted by it. These were all that she granted,

and these only can she take away under a reservation. The language of the reservation plainly confines its operation to these only. The State granted neither land, nor money, nor goods, and she can take none of these from the stockholders. The reserved power to annul the charter carries with it therefore no power whatever to seize the railroad, or to divest the stockholders or the owners of the land, of their rights and property. At common law, upon the civil death of a corporation, all its real estate remaining unsold reverts to the grantor and his heirs; for the reversion in such case is a condition annexed by law, inasmuch as the cause of the grant has failed. 1 Bl. Com. 484; 2 Kent's Com. 307; Angell & Ames on Corporations, 159, 750; Co. Lit. 13, b; 15 Howard's Rep. 310.¹ It might be that a Court of Chancery, in a proper case, would appropriate it to the debts of the corporation. But this is not the question here. It has been held that where a title to land is vested in a turnpike company for the purpose of a road, and the road is abandoned, the land reverts to the original owner; 12 Wend. 371. And writers of approved authority inform us that the grant to a corporation is indeed only during the life of the corporation, and that when its life is determined by the dissolution of the body politic, the grantor takes it back by reversion, *as in case of any other grant for life*. 1 Bl. Com. 484; Angell & Ames, 159.² If the charter in question is legally declared null and void, the railroad reverts to the former owners of the land on which it is constructed. The title by reversion is as sacred as a title in possession or remainder, and the owners cannot be deprived of it except by due course of law. So that the only effect of this act of abrogation will be to destroy the railroad altogether, or to throw it into the hands of the individual landholders along the route, without any security that it will be kept in running order for the public accommodation. Under the power to take lands for ordinary roads, the legislature might take the land on giving compensation for the improvements. But in this case no provision for compensation has been made, and that already received was only for the easement during the life of the corporation. So that by no rule of law, nor any fair construction of the clause of reservation, can the State take possession of the railroad in the manner and for the purposes proposed by the act, even if her right to annul the charter were fully conceded. It is idle to call the railroad a *common* highway, in order to justify this extraordinary act of confiscation. The State has not made it so, nor can she make it so, unless she takes the land for the purpose upon just compensation to the owners. It is of the utmost importance that the law on this branch of the case should be insisted on. If a State, under a reservation of power to revoke a charter may also seize and confiscate all the acquisitions of the stockholders, a constant temptation will be presented to exercise the power without cause.

¹ But see *Bacon v. Robertson*, *ante*, p. 618. — ED.

² But see *Nicoll v. N. Y. & Erie R. R.*, *ante*, p. 181. — ED.

A judgment should be impartially pronounced. But if the State, or local authorities of great influence, are to gain by confiscating the assets of a wealthy corporation, who can hope for an impartial decision, or what corporation in the Commonwealth is safe?

WOODWARD J. I am obliged to say, further, that I consider this Act of Assembly in direct conflict with that clause of the 10th section of the 9th article of the Constitution of Pennsylvania, which is in these words: "*Nor shall any man's property be taken and applied to public use without the consent of his representatives, and without just compensation being made.*"

The stockholders of the Erie and North East Railroad Company are *men* within this clause — the franchise they hold, (which is the right to maintain and enjoy their railroad,) and the interest they have in the ground occupied by it, and in the material substances of which it is composed, are *property*: and that it is to be taken and applied to public use under the Act of 1855, is proved by the 2d section, which authorizes the governor to appoint a suitable person to take charge and custody of the road, "*until the same shall be further disposed of according to law*;" and by the declaration of the defendant, that he will, as the appointee of the governor, take possession of the road, unless restrained by the injunction of this court. If it be assumed that the law was passed with the consent of the representatives of these *men*, the only remaining question is, does it provide a "just compensation?" There is not a word or syllable in the act looking to compensation. The 5th section authorizes the governor to restore it to the company on certain conditions to be performed by them, which, instead of being compensation, are burthens laid upon the company as the price or consideration of a renewed existence. How then can I, who am sworn to support the Constitution, support a law which is in such direct and palpable conflict with it? The Constitution says, that property shall not be taken without compensation — this law says it shall.

Let us examine the argument set up in favor of the law on this point.

Again the resort is to the repealing clause, and that is made to bear the burthen of this palpable infraction of the Constitution. Does it say that the franchise may be resumed without compensation? Not a word of it. Does the Constitution say that property shall not be taken for public use, except in the instance of a corporation, with a clause of resumption in its charter? Not a word of it. And yet judicial construction can so bend both the law and the Constitution, as to make them meet.

That the State, in virtue of her eminent domain, can take all kinds of property when public exigencies require it, is a doctrine I hold most distinctly. Every man holds everything which can be included in that most comprehensive word, "property," by no higher tenure than the will of the sovereign; but "just compensation" is the correlative duty

of the sovereign. A franchise, like any other hereditament, incorporeal or corporeal, may be taken on this single condition, but nothing that is property can be taken in violation of it. Whether a mere franchise, where nothing has been done or invested on the faith of it, is property within the meaning of the Constitution, is a question which need not now be considered, for it is not presented in the case that is before us. This is the case of a private corporation, with large investments actually made. Here the franchise, or the "rights and privileges," in legislative language, have been accepted, — property, real and personal, accumulated on the faith of them, — a railroad built in a most important line of trade and travel, and furnished with all appliances for the accommodation of the public, and a distinction can no longer be made between the franchise and the material, and tangible property with which it is identified. The legislature attempted no distinction, for in resuming the franchise, they provided also for taking the visible property, and I agree that they were so indissolubly united, that to take one was to take both.

But to take both, without a word or thought of compensation, was justified by nothing that is set down in the contract, and was forbidden by as plain words in the Constitution as the English language could place there.

Upon the dissolution of a corporation by *judicial* sentence, its real estate reverts to the grantors or their heirs, and its personal property goes to the State, as the successor to this prerogative of the crown, but no such incidents attend a *legislative* forfeiture. That must be, in all its parts, according to the contract which gives the legislature the power, and when the contract does not stipulate that property held on the faith of it may be taken without compensation, it cannot be so taken if the Constitution means what it says. If, therefore, there had been no waiver in this instance, and if the legislature had established misuse and abuse, and, in virtue of the reserved power, had resumed the rights and privileges granted, they were bound to provide a just compensation for the property taken. Confiscation of that was not in the contract, and, therefore, not within the legislative power.

Hitherto, property, in all its forms, has been regarded as one of the "general, great, and essential principles of liberty" in Pennsylvania. When the government has required more of the citizen than his share of general burthens imposed through the taxing power, he has been compensated for what has been taken. And looking to the immense investments already made on the faith of our constitutional guaranties, and yet to be made before the high destinies of the State are fully reached, it is obvious that our settled policy is not more agreeable to our fundamental law than it is to the honor and interests of the State. This act of assembly is a wide departure from our established policy and practice — evidently passed in ignorance or forgetfulness of the salutary injunction of Chancellor Kent, that "*these legislative reservations of a right of repeal ought to be under the guidance of extreme*

moderation and discretion." 2 Com. 307. The best wish that such an act is capable of exciting is, that as it has no precedent, it may never itself become one.

There is an observation in the printed argument of the counsel for the plaintiffs, which, on reflection, has made a sensible impression on my mind. It is, that the Act of 1855 is not a *bona fide* exercise of the reserved right of repeal. If this be a fair comment, it answers the whole argument in support of the law, for that rests on the reservation and nothing else. Taking the ten sections of the repealing law together, there is ground to doubt whether the legislature did not use this reservation as the means of forcing new and onerous burthens upon the company — whether they did not mean, that, instead of dying and being buried, it should survive and perform the arduous and expensive work of building a road to the harbor, and of changing their gauge throughout.

I do not intend to discuss this view of the act, but allude to it for the purpose of saying, that it would be, if so understood, no less a violation of the contract than in the other views that have been presented.

Subsequently the plaintiffs, by leave, amended their bill. An answer was filed; and testimony was taken. The cause came on for final hearing before the court in banc, June 7, 1856, on the bill, answer, plea, and proofs returned by the examiners.

Stanton and Meredith, for plaintiffs.

Thompson and Franklin, for respondent.

BLACK, J. [After overruling other objections to the constitutionality of the repealing act.]

It is further objected to this law, that it is an act of confiscation — takes private property for the public use of the state without compensation. The government of the United States is forbidden to do this by the federal constitution. That instrument of course has nothing to do with this part of the case. But the state constitution also declares that "no man's property shall be taken or applied to public use without the consent of his representatives, and without compensation being made." Does this act violate the state constitution in that part of it? We answered this in the negative when we refused the special injunction, and gave reasons which need not now to be repeated. Railroads built under the authority of law for the general purposes of commerce, are public highways. On this principle alone we decided that municipal subscriptions were valid. On this principle alone can land and materials be seized to make them. On this principle alone can the laws be justified which limit the tolls upon them. On this principle alone have we the power, so often exercised, of compelling those who have charge of them to keep within the boundaries of the law. On this principle alone we have always held that no individual or corporation can possibly have any right or privilege connected with them except what the law has expressly conferred. The charter of this company

contained a series of regulations presenting the manner in which a public highway should be used; the repeal abolished those regulations and substituted a different set. By the charter, and by the charter alone, were the plaintiffs authorized to interfere with it at all; the repeal necessarily took that authority away. A public highway is not private property any more than a public office is private property. The execution of the law relating to an office is intrusted to an individual; a corporation as well as an individual may be intrusted with the execution of the law which relates to a highway. In either case, if the trust be abused it may be withdrawn; but neither the highway nor the office is thereby extinguished. The people still have a right to be served in both, and it is the duty of the state to see that they are. The removed officer has no right to keep the records, and the removed company has no right to keep the road. If this law be unconstitutional because it takes the road from the company, then it follows that no charter of a railroad, canal, or turnpike company can ever be repealed however clear the right, nor forfeited however gross the abuse, without leaving the highway in the possession of the corporators as their private property, and giving them, as private owners, a control over it infinitely greater and more dangerous than they had before.

The suggestion that the repealing act will have the effect of putting the road into the possession of the persons whose lands were taken to build it on, is entitled to still less regard. In the first place, it is founded in manifest error. The lands were taken and devoted to public use as a highway for ever, unless the state should see proper to vacate and abandon the road. It has not been vacated or abandoned. It is to be used by the public as heretofore. The public will has been expressed that it shall be hereafter used in a different way, and the public rights upon it be guarded by different agents. If this be a vacation of the road, then the Columbia Railroad would be vacated by a change in the board of canal commissioners. Again, the landholders are not complaining of this law, nor have they authorized the company to complain for them. It is nothing to them whether the state chooses to let the cars run over the road under the command of one agent or another. But even if the landowners were here and could prove that the land has reverted to them by the operation of the repealing act, I presume nobody thinks it would be unconstitutional for that reason.

Another and most important point has been raised in the case on the final argument. Since this bill was brought, and since the motion for a special injunction, to wit, on the 22d of April, 1856, the legislature passed a new act of incorporation for the plaintiffs, giving them new privileges, and imposing upon them new duties and restrictions. This act was accepted by the stockholders, and under it the road has been redelivered to the company. Why then do they insist on a judicial recognition of their franchises under the repealed charter? This might be hard to answer, unless it be that they think the old charter more advantageous than the new one. They probably intend, if they can, to

repudiate the contract they made with the state in 1856, and fall back upon that of 1842. But could they do this even if the intermediate repealing act were void? Most certainly not. The charter of 1842 is repealed by the Act of 1856 if it was never repealed before. They will not say that the last-mentioned repeal is void, for they gave it their full assent. These plaintiffs then are before us demanding a restitution of what they call their rights under a contract which they themselves have solemnly agreed to rescind, and in whose place they have substituted a new contract, of which they are at this moment enjoying the benefits and advantages. We are thoroughly satisfied that if there were no other objections to the plaintiffs' case, we would be obliged to dismiss the bill for the sole reason that the law under which they claim has been repealed with their own consent.

The only specific relief prayed for in the bill, as originally filed, was an injunction against the defendant to restrain him from taking possession of the road and collecting the tolls. Under the Act of 1856 they have got already what is better than an injunction — the actual enjoyment of all they ask — the full possession of the road. They need no injunction, and can have none, to protect a right which nobody intends to take away. But they have amended the bill so as to pray for an account. There is no averment nor no evidence of any fact which shows that they ought to have an account. We are convinced that the defendant has no money in his hands to which the plaintiffs even pretend a claim. When this point was discussed at the bar, nobody asserted that the plaintiffs had any just demand upon the defendant for money.

The prayer of the plaintiffs to be protected in the possession of the railroad and its revenues under the charter of 1842, must be refused. — 1st, Because that charter was constitutionally repealed in 1855, for abuse and misuse; 2d, Because it was also repealed in 1856, with their own consent; and 3d, Because they have the railroad in their possession under another charter which they have accepted. Their prayer for an account is refused, because they show us no ground nor reason for believing that there is any account between them and the defendant.

It is ordered, adjudged, and decreed, that the plaintiffs' bill of complaint in this cause be dismissed, and that the defendant do recover from the plaintiffs the costs by him in this behalf expended.

LEWIS, C. J., dissented, and WOODWARD, J., was absent on the final argument.

GREENWOOD v. UNION FREIGHT R. CO.

1881. 105 U. S. 13.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

The case was argued by *Mr. George F. Edmunds*, with whom was *Mr. Alonzo B. Wentworth*, for the appellant, and by *Mr. Darwin E. Ware* and *Mr. William G. Russell* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant, Greenwood, a citizen of the State of New York, brought his bill of complaint against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name; and against the directors of the Marginal Freight Railroad Company, — all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an act of the legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of a provision in its charter, purchased and paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that and any other street-railroad company, on payment of compensation. This latter act also repealed the charter of the Marginal Company.

Sections 4, 6, and 7 of this act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal Company, and, as they are short, they are here given verbatim: —

“SECT. 4. Said corporation may, within its authorized limits and for the purposes of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.”

“SECT. 6. Said corporation shall, within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

“SECT. 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an ‘Act to incorporate the Marginal Freight Railway Company,’ and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company, are hereby repealed.”

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the State courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an injunction against all the defendants, to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal Company, shows no right to sustain this bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes v. Oakland* (104 U. S. 450), in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all

corporate powers under the act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is, whether the features of that act to which complainant objects in his bill are beyond the power of the legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two:—

1. The repeal of the charter of the Marginal Company.
2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the incorporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in sect. 41 of chap. 68 of the General Statutes of Massachusetts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may

adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature," is significant, and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. *Crease v. Babcock*, 23 Pick. (Mass.) 334; *Erie & N. E. Railroad Co. v. Casey*, 26 Pa. St. 287; *Pennsylvania College Cases*, 13 Wall. 190; 2 Kent Com. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were author-

ized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales v. Stetson* (2 Mass. 143), the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck* (6 Cranch, 87) and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises con-

ferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson*, 2 Mass. 143.

It would seem that the States were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal (*McLaren v. Pennington*, 1 Paige (N. Y.), 102), in which the legislature of New Jersey, when chartering a bank with a capital of \$400,000 in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend, and repeal the same. And Kent (2 Com. 307), speaking of what is proper in such a clause, cites as an example a charter by the New York legislature, of the date of Feb. 25, 1822. How long the legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases*, *supra*; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Company v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 id. 700; *Railroad Company*

v. *Georgia*. 98 id. 359; *McLaren v. Pennington*, *supra*; *Erie & N. E. Railroad v. Casey*, *supra*; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfil the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfil a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Sect. 4 of the act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *West River Bridge Co. v. Dix*, 6 How. 507; *Central Bridge Corporation v. City of Lowell*, 4 Gray (Mass.), 474; *Boston Water-power Co. v. Boston & Worcester Railroad Corporation*, 23 Pick. (Mass.) 360; *Richmond &c. Railroad Co. v. Louisa Railroad Co.*, 13 How. 71.

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the act, *shall* take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad com-

panies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for \$15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares *all* acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill.

Decree affirmed.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

PEOPLE v. O'BRIEN.

1887. (*In the Supreme Court*), 52 *New York Supreme Court* (45 *Hun*), 519.

1888. (*In the Court of Appeals*), 111 *New York*, 1.¹

THE questions in this case grow out of the legislative act purporting to annul and dissolve the Broadway Surface Railroad Company, and to repeal its charter.

Section 18, Article 3, Constitution of New York (adopted in 1875) provides, that no law shall authorize the construction or operation of a street railroad, except upon the condition that the consent of the local authorities having the control of the street be first obtained.

The Broadway Surface Railroad Company was organized May 13, 1884, under the act of May 6, 1884, chapter 252 (11 N. Y. Statutes at Large, 580-586). Chapter 252 is entitled "An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages." By the provisions of this chapter, individuals may, in certain prescribed methods, form a company for the purpose of constructing and operating street surface railroads. The corporation so formed may construct and operate such a railroad, provided that the consent of the local authorities be first obtained; and either the consent of one half in value of the abutting owners, or a decision of the court in favor of the construction. Section 7 provides, that the local authorities to whom application, under the provisions of this act may be made for consent to the construction, &c., of such a railroad, "may, at their option, provide for the sale of, and sell at public auction the franchise subject to all the provisions of this act, to so construct, maintain, use, operate or extend such street surface railway." Section 8 provides that every corporation under this act, within cities having a population of 250,000, or more, shall annually pay into the city treasury a specified percentage of its gross receipts. In smaller municipalities, the local authorities may require, as a condition to their consent to the construction of a road under this act, the annual payment to the municipalities of such percentage of gross receipts, not exceeding three per cent, as they may deem proper. The corporate rights, privileges and franchises acquired under this act, by any corporation which shall fail to comply with all the provisions of this section, shall be forfeited to the people of the State of New York, and upon judgment of forfeiture rendered in a suit brought in the name of the People by the Attorney General, shall cease and determine. Section 15 authorizes any street surface railroad company to lease or transfer its right, subject to all its obligations in respect thereof, to run upon or to use any portion of its

¹ Statement compiled from both reports. Arguments omitted. Only portions of the opinions are given. — Ed.

tracks to any other such company authorized to run upon such route (with an exception in certain cases of parallel roads). Section 1 gives the corporation all the powers and privileges granted by the Act of April 2, 1850 (relative to the formation of railroad corporations), and the several acts amendatory thereof. One of the powers granted by the Act of 1850 and the amendatory Act of 1880, is the power "to mortgage their corporate power and franchises to secure the payment of any debt, . . ."

Section 19 provides that "the legislature may at any time alter, amend or repeal this act."

Section 1, enacts that the persons associating and the stockholders shall be a corporation, and shall be subject to the provisions of Title 3, Chap. 18, First Part Revised Statutes. One of those provisions is, that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

Section 1, also enacts that the corporation shall be subject to all the liabilities imposed by the Act of April 2, 1850, relative to the formation of railroad corporations. One of the provisions in the latter Act is, that "the legislature may at any time annul or dissolve any corporation formed under this act."

Section 1, Article 8, of the Constitution of New York provides that general laws and special acts relative to corporations "may be altered from time to time, or repealed."

Dec. 5, 1884, by resolution of the common council, the consent of the City of New York was given to the Broadway Surface Railroad Company to lay tracks and run cars over Broadway. This consent was given upon terms and conditions prescribed in the resolution, among which was the payment of a considerable sum of money to the municipality. The Broadway Surface Railroad Company, in lieu of the consent of the abutting owners, obtained a decree of the court in favor of constructing the road. The Broadway Surface Railroad Company mortgaged its property and franchises as security for contemplated loans, and its bonds were sold to a large amount. It also made contracts with other street railroad companies, owning roads connecting with its contemplated line, for the use of their several tracks by each other, for which it received a large present pecuniary consideration from each of said companies, besides the exchange of mutual benefits and accommodations. In 1885, the Broadway Surface Railroad Company constructed its track, and operated the road thenceforth until May 4, 1886.

On May 4, 1886, the legislature passed an Act (Chapter 268), declaring "that the corporation called the Broadway Surface Railroad Company . . . be and the same is hereby annulled and dissolved and its charter is hereby repealed."

On the same day, the legislature passed another Act (Chapter 271), enacting: 1. That whenever any street surface railroad company shall

have been dissolved or its charter repealed by the legislature, the consent of the abutting owners and of the local authorities shall not be deemed affected by such dissolution or repeal. 2. That the right to the further enjoyment and use of the said consents, and of all the powers, &c., thereby created, shall be sold at public auction by the municipal authorities. 3. That the purchaser at such sale shall have the right to the further enjoyment of such consents in like manner as if originally named therein, provided that such purchaser shall be otherwise authorized by law to construct and operate a street surface railroad within the municipality.

The Revised Statutes of New York, Part 1, Title 3, Chapter 18, Sections 9 and 10, provide that upon the dissolution of any corporation, unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the corporation at the time of its dissolution shall be the trustees of the creditors and stockholders, and shall have full power to settle its affairs.

May 11, 1886, the legislature passed an Act (Chapter 310), providing that whenever a corporation shall be dissolved by the legislature, it shall be the duty of the Attorney General to bring suit, in the name of the People, to wind up its affairs; and the court shall, in such suit, appoint a receiver. The Act also contains provisions as to the method of establishing claims of creditors.

Under the latter Act the Attorney General brought suit; and, on May 14, 1886, John O'Brien was appointed receiver, without notice to, or hearing, anyone on behalf of the company.

The present proceeding is a supplementary action, brought July 8, 1886, by the Attorney General in the name of the People of the State, against the City of New York, the receiver of the Broadway Surface Railroad Company, and numerous other corporations and persons, alleged to have had dealings with such company, either as stockholders, mortgagees, creditors or contractors. This supplementary action was brought for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties, as affected by the dissolution of the corporation; determining the fact as to what were assets of the company, and the extent of the interests of the several parties therein; and restraining the mortgagees, contractors and others from taking legal proceedings to enforce their rights in, and liens upon, the property of the corporation.

At Albany Special Term, the case was tried by the court, without a jury. A judgment was rendered to the effect that the mortgages were valid liens upon the property of the company and upon its franchise to run a railroad, and survived the dissolution of the corporation; that the traffic contracts were not affected by the dissolution; that the Act (Chapter 271) providing for the sale of the franchise was unconstitutional; and that the part of the Procedure Act (Chapter 310) which provides a method of proving debts was also unconstitutional. By this judgment the Mayor of New York was enjoined from proceeding under the Franchise Disposal Act (Chapter 271).

From this decision an appeal was taken to the General Term.

Denis O'Brien, Attorney General, and *William A. Poste*, Deputy Attorney General, for the People.

Leslie W. Russell, for the Receiver.

Albert Stickney, *Thomas Allison*, *Stephen P. Nash*, *Edward W. Paige*, *James C. Carter*, *Elihu Root*, and *William C. Gulliver*, for various defendants.

LONDON, J.

The repealing act by its terms limits its destructive force to the corporation and its charter. Its language is: "The corporation . . . is hereby annulled and dissolved, and its charter is hereby repealed." Both corporation and charter were annihilated co-instantaneously. Although two phrases are used in the act, one dissolving the corporation, and the other repealing the charter, each phrase is a sentence of death. While alive the corporation had its charter and all its property and franchises. Whatever power of alteration or forfeiture the legislature possessed, was never exercised during the life of the corporation. It died therefore in the fullness of its rights and acquisitions. Of course when the corporation was dissolved, its physical power to operate this railroad was destroyed; the dead have no powers. Its franchise to be a corporation was destroyed; liberty to live cannot survive death. When the corporation was organized it was given life and endowed with faculties and powers to act and acquire in defined lines of business. By the exercise of its powers it could acquire property rights. But it was empty handed. What it obtained afterwards in the line of its proper business was its acquisition, not part of itself, but as distinct from it as the owner is from the thing owned.

It died full handed, and its dead hands dropped their holdings charged with every lien and burden lawfully created, into the living hands appointed by law to receive them. The owner was taken away; the property owned was left. This property consisted of two kinds, corporeal and incorporeal. The corporeal was the railroad upon Broadway, already constructed in pursuance of the grant of that right and interest in the soil of the surface of the street, sufficient to enable the company to make the construction thereon. If that grant, standing alone, was of sufficient quantity to enable the company to maintain the railroad upon the street, then the grant of the interest in the soil granted both the right to construct and maintain. The construction was an executed act, the maintenance an act for the future. No law could defeat acts already accomplished, but could, it is conceivable, defeat the performance of contemplated future acts, if the power to defeat them inhered in the title granted to the company. But to maintain a railroad upon a public street would be a nuisance unless authorized by law. (*Fanning v. Osborne*, 102 N. Y., 441.) The right to maintain this constructed railroad was therefore a franchise. So, also, was the right to operate it.

The franchises of a corporation, which form part of its life and body, must, of course, be held upon a life tenure. The franchise to construct, maintain and operate this railroad was an acquisition subsequent to the creation of the corporation. We may grant that, upon the creation of the corporation, it was endowed with the power to construct, maintain and operate this or any other street surface railroad, provided it should first obtain the right to do so. The power was a physical or personal attribute or capacity, like any man's power, honestly to get what he lawfully may; but no right to the franchise was obtained until it was acquired as the fruits of the exercise of the power to get it. This corporation did exercise its powers of acquisition, and did create and acquire this railroad, and therewith and as elements or qualities of this property, and so inseparable from it that they constitute its chief value, acquired its usable and usufructuary capabilities or properties. The particular franchises acquired came with the acquisition of this particular property. The distinction between the franchises which are strictly the personal attributes of the corporation, and the franchises which pertain to the uses to which its railroad property is fitted, is well recognized. (See cases, hereafter cited, as to the assignability of such franchises.) The distinction is just. What sort of a government would that be which, after inducing its subjects to create a railroad, should then forbid its use?

The common law rule that the tenure of such a franchise is for the life of the corporation has been materially changed by our statutes, and in the case of street surface railroads by article 3, section 18, of the State Constitution. The rule, as we believe it to be, is that to the extent that the Constitution and statutes have permitted the property franchises to be acquired by purchase instead of solely from the bounty of the State, the tenure depends upon the contract of purchase; and to the extent that the corporation has, under statutes authorizing it to do so, entered into contracts binding the property franchise, to that extent, the personal quality of the franchises has been changed into an assignable quality, and the life tenure into a tenure adequate to uphold such contracts. It may be conceded that to the extent that the property franchises have not been acquired or bound by contract, the common law tenure prevails.

The grant to this corporation of the interest in the surface of the soil of Broadway sufficient for the exercise of the right to construct, maintain and operate a railroad thereon, and also of the right itself, was initiated and completed in accordance with the provisions of chapter 252, Laws of 1884. This act was passed to carry into effect, among other conditions, the conditions provided by section 18, article 3, of the Constitution, adopted in 1875. This section provided that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon

which it is proposed to construct or operate such railroad, be first obtained." Prior to the adoption of this provision of the Constitution it had been settled by the adjudications of the courts that the title to the land of the bed of the street was vested in the city in trust for the people of the State; that the adjoining owners had certain easements therein, but that the State had the right to authorize the construction of a railroad thereon without providing compensation either to the city or adjoining owners unless the owners would suffer some special injury. (*The People v. Kerr*, 27 N. Y., 188; *Kellinger v. Forty-second St.*, etc., *R. R. Co.*, 50 id., 206; *Milbau v. Sharp*, 27 id., 611.)

The constitutional provision of 1875, above referred to, placed important restraints upon the power of the legislature to authorize the construction of railroads upon the streets, and imposed conditions to enable the city and property owners to protect their own interests against the improvidence of the State, or the rapacity of the railroad company. The grant of the franchise originates with the State as before, but power of the State to complete its grant, so as to vest it in the possession and enjoyment of the grantee, is made dependent upon the consent of the city and of the property owners; until this consent be given the grant is only inchoate, a mere tender upon conditions, and the conditions may never be performed by the city and property owners, or the grant be accepted by the grantee. The city and the property owners are thus brought in as parties whose consent is necessary. Some of the terms which the city may impose, as the price of its consent, are prescribed in chapter 252, Laws 1884. Section 7 provides that: "The local authorities of any incorporated city or village, to whom application under the provisions of this act may be made for consent to the construction, maintenance, use, operation or extension of a street surface railroad upon any street, . . . may, at their option, provide for the sale of, and sell at public auction the franchise, subject to all the provisions of this act." Thus the legislature expressly makes the franchise purchasable property. It may be observed that a franchise, purchasable in the first instance at public auction, is obtainable upon other considerations than the gracious favor of the sovereign and special personal confidence and trust in the grantee, which form the basis of a tenure for life.

The State, therefore, may not vest its grant of the franchise in the grantee except in pursuance of the terms of such contract conditions as the city and grantee enter into, and to which the State has pledged its consent in advance. The interest in the land on the surface of the street, and the franchise to construct, maintain and operate the railroad thereon, all pass together to the grantee, upon the completed execution of the grant by all the grantors, and its acceptance by the grantee. The contract between the city and the grantee, to which the State is also a consenting party, is thus authorized by the State Constitution, and the National Constitution forbids the State to impair its obligations. (U. S. Const., art. 1, § 10.) The consent of the property owners may also be based upon contract equally inviolable.

It follows that the tenure of the grant of the interest in the real estate of the street and of the franchise, must be adequate to uphold the contracts upon which the consents were obtained, and also be of the extent expressed in such contracts. It is objected that such construction practically defeats the intention of the legislature in dissolving the corporation. That intention must, of course, be controlled by the constitutional protection of contract obligations. Neither public nor private interests are supposed to be promoted by the destruction of valuable property, and no person or corporation can be deprived of vested rights in property except upon due process of law. When the Constitution made the vesting of this franchise dependent upon the execution of a contract between the city and the company, it allowed the franchise to become the subject-matter of the contract, and the consideration upon which it was entered into; and since the subject-matter and consideration cannot be withdrawn from the obligations of the contract without impairing those obligations, the Constitution places it beyond the power of the State, without the consent of both city and company, to withdraw this franchise. Its reserved power was limited to the destruction of the powers it gave to the company as a part of its life and being, and to the regulation of those powers and the property rights the company acquired by their exercise, and did not extend to the destruction of such rights.

The power of the legislature to resume, by right of eminent domain for public purposes, such property rights, upon making just compensation, may also be conceded. (*Sixth Av. R. R. Co. v. Kerr*, 72 N. Y., 330.) If the State also retains the power to impair its own contract with the company in its part of the grant, it does not reserve the power to impair the contract of the city and company, and since in this case one contract cannot be impaired without impairing the other, neither can be. (*Commonwealth v. Essex Co.*, 13 Gray, 239.) Plainly property rights acquired by the corporation by the exercise of its corporate powers are vested rights, and the contract with parties other than the State, whereby they were lawfully secured, are within the protection of the National Constitution.

The consent of the city was given by its common council to the Broadway Surface Railroad Company upon the agreement of the company, secured by an adequate bond, to pay the city \$40,000 per year by way of rent, also three per cent upon its earnings for the first five years and five per cent per year thereafter, and to do and perform certain other things burdensome to the company and beneficial to the city. The consent was "to construct, maintain, operate and use a street surface railroad for public use in the conveyance of persons in cars" on Broadway, between designated *termini*. This consent was formally accepted by the company. No term of time is expressed in the consent. For five years three per cent per year of the earnings must be paid, and five per cent per year thereafter, thus indicating an indefinite length of time after five years. The consent is given upon

condition that the provisions of chapter 252, Laws of 1884, shall be complied with, and also upon the condition that if the company should fail to pay the percentages, the provisions of the act providing for a forfeiture of the franchise upon judgment in a suit to be brought by the attorney general should be applicable. This consent and acceptance constitute a contract.

Prior to the adoption of the constitutional amendment of 1875, the effect of such a contract, substantially, as was here entered into between the company and the city, provided there were the constitutional and legislative power to make it, had been frequently discussed by the courts, and the substance and effect of the decisions were, that thereby a grant, both of an irrevocable property interest in the street and of the franchise to construct, maintain and operate the railroad and take tolls thereon, would be made.

Independently of the peculiar features of a grant of property franchise to street surface railroads impressed upon the grant by the constitutional provision of 1875, such franchises, as the cases above cited, touching their assignability, show, have the same assignability as the franchises of other railroad companies. This proceeds from the act authorizing the incorporation, and the statute referred to therein, already quoted, authorizing the company to mortgage its franchises. The statute which authorizes the mortgage of the franchises imports a tenure adequate to uphold the mortgage.

The fifteenth section of chapter 252, Laws 1884, expressly provides for the lease or transfer, by one street railroad company to another duly authorized, of the right to run upon, or use any portion of the street railroad tracks. This implies the assignability of the franchise, to the extent necessary to uphold such lease or transfer.

It follows from what we have said that, upon the dissolution of the corporation, the railroad and the franchise to maintain, construct and operate it were not destroyed or impaired, but passed as a legal estate, charged with the mortgages and burdens legally placed thereon, to the directors of the Broadway Surface Railroad Company, as trustees of the creditors and stockholders of the company. (1 R. S. m. p. 600, § 9.) The act (chap. 310, Laws of 1886) provided for transferring this trust from the directors to the receiver.

The property of the Broadway Surface Railroad Company and franchise to construct, maintain, operate and use it, if the foregoing views are correct, are now vested in the receiver, subject to the mortgages, contracts and conditions by which the same were bound at the instant of the dissolution of the company. Since none of these were impaired in their lien upon the property and franchise, it follows that they are as valid against the receiver as they were against the company. If the

company could not defend against the mortgages, the receiver cannot. If the company could not defend against the traffic contracts, the receiver cannot. If the company acquired the benefit of the contracts and orders, whereby the consents of the city and property owners were vested in the company, the same benefit is vested in the receiver for the benefit of the stockholders and creditors. No legislation could validly impose upon or vest in the receiver the right or power to divest this estate of any of its rights or property and bestow them, or any of them, upon the city or State, except upon just compensation. The statute (chap. 271, Laws of 1886), so far as it provides for the sale of the consents of the city and property owners, is, therefore, void.

[Remainder of opinion omitted.]

BOCKES, J., concurred in the conclusion.

LEARNED, P. J., concurred, except as stated in his opinion [which holds that the act relative to the appointment of a receiver without notice is invalid; and also that the legislature had no power to dissolve a corporation formed under a general law.]

From a judgment entered in accordance with the above opinion of LANDON, J., appeals were taken by various parties. The case was argued in the Court of Appeals, March 5, 1888.

Charles F. Tabor, Attorney General, and *William A. Poste*, for the People.

Denis O'Brien, for the Receiver.

James C. Carter, *Elihu Root*, *Albert Stickney*, *Nelson S. Spencer*, *S. P. Nash*, *Lyman Rhoades*, *Edward W. Puige*, *Thomas Allison*, and *William C. Gulliver*, for various defendants.

RUGER, C. J.

The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest from the company its franchises; to transfer them to other persons, and bestow their value upon the donees of the state. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is, therefore, urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

When we consider the mode required by the statutes and the Constitution, to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible, for it cannot be supposed that either the legislature or the framers of the Constitution intended

to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees, as often as popular caprice might require it to be done.

Neither can it be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent.

We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the usual and common signification of that word. (*Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 id. 263.)

But even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains as to the effect of such a repeal upon the franchises of the corporation; whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business, and exercise corporate functions after that time, or has a wider scope and effect.

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may, therefore, be conceded that the state had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading and insurance powers, and similar privileges. The franchises last referred to being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. (*People v. B., F. & C. I. R. R. Co.*, 89 N. Y. 84; *People v. Metz*, 50 id. 61.)

In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. (*Gue v. Tide Water Canal Co.*,

24 How. [U. S.] 257), and by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our state authorizing the sale of the franchise and property of a railroad company on execution, seems to recognize the indissolubility of the connection between the corporeal property, and its incorporeal right of enjoyment.

It is also to be observed that in none of the provisions for repeal in this state is there anything contained, which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. (*Mumma v. Potomac Co.*, 8 Pet. 281, 285.)

The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred. (*Butler v. Palmer*, 1 Hill, 335.)

The authorities seem to be uniform to the effect that a reservation of the right to repeal, enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business (*People ex rel. Kimball v. B. & A. R. R. Co.*, 70 N. Y. 569; *Philips v. Wickham*, 1 Paige, 590), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts. (*Munn v. Illinois*, 94 U. S. 113, 123.)

We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice MARSHALL in *Fletcher v. Peck* (6 Cranch, 87, 135): "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or property of citizens beyond the scope of express constitutional power.

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In *Erie & N. E. Railroad Company v. Casey* (26 Penn. St. 287, 301), the question arose under a statute which specially provided that the state might resume all rights conferred in case of an abuse or misuse of the powers granted to the corporation. Upon an alleged abuse of power, the legislature repealed the charter and resumed the subject of the grant. The corporation forfeited its rights by its voluntary act. The reservation in the charter was expressly made a condition subsequent. The case was between the representative of the state and the railroad corporation, and no rights of creditors, mortgagees or stockholders were involved in its decision. It also appears by the case that the state and the corporation had settled their controversy by compromise during the pendency of the litigation, and it can hardly be said to have involved any practical question.

We are, therefore, of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution.

We are thus brought to the question of the right of succession to the property of a dissolved corporation in the absence of any provision in the act of dissolution providing for such an event.

The judgments of the Special and General Terms should be reversed and the complaint dismissed, with costs to the defendants other than the receiver.

All concur, except PECKHAM and GRAY, J. J., not sitting.

ANDREWS and EARL, JJ., concur in the result upon these grounds: (1.) The annulling act is constitutional and valid, and its effect was only to take the life of the corporation. (2.) All the property of the corporation, including its street franchises and its mortgages and valid contracts, including what are called the traffic contracts with other railway companies survived. (3.) The act chapter 271 is unconstitutional. (4.) That act and the act chapter 310 are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation and disposing of and distributing its property. The main features of the latter act are unconstitutional and void, and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation. (5.) As the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance; and, therefore, the judgment should be reversed and complaint dismissed.

All concur.

Judgment accordingly.

SECTION IV.

Reserved Power of Legislature to alter or amend Charter.

TOMLINSON v. JESSUP.

1872. 15 *Wallace* (U. S.), 454.¹

APPEAL from the U. S. Circuit Court for the District of South Carolina.

Bill in equity by stockholder in Northeastern Railroad Company, to enjoin state officials from levying a tax on the property of the road. The N. E. R. Co. was incorporated in 1851 by the legislature of South Carolina. At that time the 41st section of the act of 1841 was in force, as follows:

“It shall become part of the charter of every corporation, which shall, at the present, or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal, by the legislative authority.”²

The act of incorporation did not except the charter of the company from the operation of this section.

By an amendment of the charter passed in 1855, it was enacted as follows:

“That the stock of the said company, and the real estate that it now owns or may hereafter acquire, which is connected with or subservient to the works authorized in the charter of the said company, shall be, and the same is hereby exempted from all taxation during the continuance of the present charter of the said company.”³

The constitution of South Carolina, adopted in 1868, provided that the property of corporations then existing, or thereafter created, should be subject to taxation. Statutes were subsequently passed providing for taxing property of railroad companies, under which state officials were proceeding to tax the property of the Northeastern R. R. Co.

The court below granted a final injunction. The defendants appealed.

D. T. Corbin, and *D. H. Chamberlain*, for appellants.

T. G. Barker, *contra*.

¹ Statement abridged. — Ed.

² Stat. at Large, vol. 11, p. 168.

³ *Ib.*, vol. 12, p. 407.

FIELD, J.

The provisions of that law [the act of 1841], therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.

The act amending the charter of the Northeastern Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrevocable and protected from any measures affecting its obligation.

There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. It was so adjudged at an early day in *New Jersey v. Wilson*;¹ the adjudication was affirmed in *Jefferson Bank v. Skelly*;² and has been repeated in several cases within the past few years, and notably

¹ 7 Cranch, 164.

² 1 Black, 436.

so in the cases of *The Home of the Friendless v. Rouse*¹ and *Wilmingtton Railroad v. Reed*.² In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.

DECREE REVERSED, and the cause remanded with directions to

Dismiss the suit.

BUFFALO & N. Y. CITY R. R. CO. v. DUDLEY.

1856. 14 *New York* (4 *Kernan*), 336.³

ACTION to recover the amount subscribed by the defendant to the capital stock of the Attica and Hornellsville Railroad Company. The corporation was chartered in 1845, with a capital of \$750,000. In 1847, defendant subscribed for twenty shares. At the time of the subscription the act of incorporation authorized the construction of a

¹ 8 Wallace, 430.

² 13 Id. 264.

³ Statement abridged. Only so much of the case is given as relates to a single point. — ED.

railroad from Hornellsville to Attica, a distance of sixty miles. The right to alter or repeal was reserved to the legislature in the act of incorporation. On the 31st of March, 1851, an act was passed by the legislature to amend the charter of said company so as to authorize said company to extend the road to the city of Buffalo, to change the corporate name, and to increase its capital stock to \$1,500,000. On the 16th of April, 1851, the directors of the company met in pursuance of the last named act and accepted it; changed the name of the corporation to the present name; extended the road to Buffalo, a distance of thirty-one miles beyond Attica, and increased the capital stock to the prescribed amount.

The defendant's answer set up as a defence to the action, that the plaintiff's charter had been altered and its road extended after his subscription and without his consent, and alleged that such alteration and extension were prejudicial to his interest as a stockholder.

At the trial defendant moved for a nonsuit on the following grounds (among others): Fifth, that defendant never subscribed to any stock in a road from Hornellsville to Buffalo. Sixth, that by the alteration of the charter in a fundamental part and extending the road, the defendant was absolved from his obligation to pay his subscription. The motion for a nonsuit was overruled, and defendant excepted.

The defendant then offered to prove the cost of the extension from Attica to Buffalo; that it was injurious to his interests, and was made without his consent or concurrence; but the evidence was excluded, subject to defendant's exception.

The court, against defendant's objection, ruled that there was nothing to go to the jury, and directed a verdict for plaintiff. A judgment entered upon this verdict was affirmed at the General Term of the Supreme Court. Defendant appealed.

John Ganson, for appellant.

H. W. Rogers, for respondent.

T. A. JOHNSON, J.

The subscription having been valid, so as to give a right of action, in case of non-payment, to the corporation, did the alteration of the charter and the extension of the road subsequently absolve the defendant from his liability upon such subscription? This question is, I think, entirely settled by the decision of this court in the case of *Schenectady and Saratoga Plank Road Company v. Thatcher* (1 Kern., 102). The right to alter was reserved in the charter, and the subscription must be taken to have been made subject to having such additional powers conferred as the legislature might deem essential and expedient. The change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation remaining still the same. It may be admitted that, under this reserved power to alter and repeal, the legislature would have no right to change the fundamental

character of the corporation and convert it into a different legal being, for instance, a banking corporation, without absolving those who did not choose to be bound. But this they have not attempted to do. The additional powers are of the same character, and have been regularly acquired from the legitimate source of power, and if they have been fairly exercised, the defendant, although the change may have operated to his pecuniary disadvantage, is still bound by his undertaking. It is no breach of the agreement between the plaintiff and the defendant. It might, perhaps, be inferred from some expressions in the opinion of Parker, J., in the *Schenectady and Saratoga Plank Road Company v. Thatcher* (*supra*), that that case turned in some measure upon the fact that there was no suggestion or proof of injury to the defendant's interests resulting from the change complained of. It is obvious, however, that the decision was not based upon any such consideration. It is manifestly a question of power; and if the power was legitimately acquired, and has been exercised without fraud, the rights of the parties are in no respect changed as between themselves, whether the alteration is beneficial or injurious to the defendant's interest. Whether he has made or lost by the change, in no respect affects the question of authority in the plaintiff.

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 SELDEN, J.

The point made by the defendant upon the alteration of the plaintiff's charter, changing the name of the corporation and authorizing the extension of its road from Attica to Buffalo, must, I think, be considered as sufficiently answered by the decision of this court in the case of *The Schenectady and Saratoga Plank Road Company v. Thatcher* (1 *Kern.*, 102). The power reserved to the legislature in the original act of incorporation, to alter or repeal the act, is as broad in this case as in that. It is, indeed, entirely unlimited. Under the rule established in that case, no mere addition to or alteration of the charter, however great, would operate to discharge a stockholder from his obligation to the corporation. To work such a discharge the charter must be repealed, or the legislation must be such as virtually to subvert the corporation itself; or, at least, to destroy its identity. A mere change of name has been repeatedly held not to have that effect. (*Mayor of Scarborough v. Butler*, 3 *Lev.*, 238; *Mayor of Colchester v. Seaber*, 3 *Burr.*, 1866; *Mellor v. Spateman*, 1 *Saund.*, 344, note 1; *Overseers, &c., of North Whitehall v. South Whitehall*, 3 *Serg. & Rawle*, 117.) In other respects the change in this case is not materially greater than in that of *The Schenectady and Saratoga Plank Road Company v. Thatcher* (*supra*). It does not become necessary, therefore, to take into consideration the soundness of the principles advanced in the case of *The Hartford and New Haven Railroad Company v. Croswell* (5 *Hill*, 383). That case is in direct conflict with several English cases, as well as with some decided in this country;

and a portion of its reasoning would, I think, require to be examined with some care before it is finally adopted. (*Midland Railway Company v. Gordon*, 16 *Mees. & Wels.*, 803; *Stevens v. The South Devon Railway Company*, 13 *Beav.*, 48; *Ffooks v. The London and South Western Railway Company*, 19 *L. & Eq. R.*, 7; *Irwin v. The Turnpike Company*, 2 *Penn.*, 466; *Gray v. The Monongahela Navigation Company*, 2 *Watts & Serg.*, 156.)

COMMONWEALTH v. ESSEX COMPANY.

1859. 13 *Gray*, 239.¹

INDICTMENT against the Essex Company on the Statute of 1856, Chap. 289, for neglecting to make and maintain around their dam across the Merrimac River, at Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish.

The Essex Co. was chartered in 1845 for the purpose, among other things, of constructing a dam across Merrimac River. By the charter the corporation was required to make and maintain, in such dam, suitable and reasonable fishways; to be built in the mode to be prescribed by the county commissioners; and to be accepted by the commissioners. The company did construct fishways in their dam, according to the prescription of the commissioners, and to their satisfaction as having been built according to their prescription; and the company have maintained the same during the time mentioned in the indictment. After it had become well known that the said fishways did not, in fact, afford a usual and unobstructed passage, an additional act was passed by the legislature, in May, 1848. By this act the company were authorized to increase their capital stock, but upon the express condition "that said company shall be liable for all damages which shall be occasioned to the owners of fish rights existing above the said company's dam, by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam." A mode of assessing these damages was provided by the act. A second section of this act of 1848 provided that it should take effect upon acceptance by the stockholders and the filing of an authenticated copy of the vote of acceptance. Such a vote was passed, and a copy duly filed. Soon after, the defendant company paid, under said act, about \$26,000, to various owners of fish rights above said dam, as damage for hindering or impeding the passage of fish.

June 6, 1856, the legislature passed the act upon which the present

¹ Statement abridged. Arguments and part of opinion omitted. — ED.

indictment is founded ; requiring the Essex Company, before the 1st of February, 1857, to make, and forever thereafter maintain, in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish, under a penalty of not less than \$100 nor more than \$500 a day for the time they should neglect to make and maintain such fishway after said 1st of February. The first cost of such a structure would amount to a sum variously estimated at from \$10,000 to \$40,000.

The company, having failed to provide any new fishway after the passage of this act, were indicted for such neglect. Upon the trial, the company offered to prove the above facts as to the approval of the fishways by the commissioners, and the payment of damages under the act of 1848 ; but the evidence was excluded, and the jury were instructed to return a verdict of guilty. Defendants excepted.

R. Choate, and *E. Merwin*, for defendants.

S. H. Phillips, Attorney General, for the Commonwealth.

SHAW, C. J.

It seems to be well settled that the obstruction of the passage of the annual migratory fish through the rivers and streams of the commonwealth, is not an indictable offence at common law. But the right to have these fish pass up rivers and streams to the head waters thereof is a public right, and subject to regulation by the legislature ; though the right to take fish in waters not navigable belongs to the riparian owners of the soil along the shores and banks of such rivers and streams. *Commonwealth v. Chapin*, 5 Pick. 199. The liability, therefore, of the defendants to this indictment depends upon the statute.

From this view of the law of Massachusetts, we come to the conclusion, that from the earliest times the right of the public to the passage of fish in rivers, and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to the regulation of the legislature ; and the mode adopted by the legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams, such sluices and fishways as would enable these migratory fish, according to their known habits and instincts, to pass from the lower to the higher level of the water, occasioned by such dam, so that, although their passage might be somewhat impeded, it would not be essentially obstructed thereby. This was the only remedy, because no private action would lie for the riparian proprietor, and no indictment at common law for the public injury.

3. We are now to consider what are the true construction and operation of the act of incorporation, by which the defendants were constituted and chartered.

All provisions of statute, made for regulating the fisheries, are intended for the public benefit, and all persons, at their peril, must take

notice of them; they are therefore public statutes, and the courts of law will, *ex officio*, take notice of them. *Burnham v. Webster*, 5 Mass. 266. *Commonwealth v. M'Curdy*, 5 Mass. 324.

The objects proposed to be accomplished by the defendants were so far public in their nature, and designed to promote the public benefit, that it was quite competent for the legislature to exercise the power of eminent domain, by authorizing them to take private property when necessary, providing modes by which a full compensation therefor should be made. These objects were to establish a great water power for manufacturing and mechanical purposes, and for improving the navigation of the river by locks and canals. *Boston & Roxbury Mill Dam v. Newman*, 12 Pick. 467. *Hazen v. Essex Co.* 12 Cush. 477, 478. The usual provision was made for the assessment and payment of damages, which is made where private property is authorized to be taken for public use.

The usual provision was also made for the preservation of the rights of fishery, both public and private, which have been made in like cases, by requiring the company to make and maintain fishways in said dam, which should be made to the satisfaction of the county commissioners. We believe it has been usual, in such acts of legislation, to delegate an authority to a committee or commissioners, to see that certain provisions are specifically carried into effect; and we have never known the legality of such delegation of power questioned. In the leading case of *Stoughton v. Baker*, before cited, it was held that where a certain portion of the things authorized to be done by a committee of three was done by one, to that extent the power was not well executed.

It appears by the facts that the county commissioners did, in due form, prescribe the mode in which fishways should be made, and they were so made, and afterwards maintained, to the time of finding this indictment, in the mode thus prescribed. Under these circumstances, we are strongly inclined to the opinion that the company had performed the condition on which their charter was granted, and would be free from public prosecution. Whether, if the fishways actually provided had proved wholly unfit and inadequate to their purpose, and other measures could be provided within a reasonable cost, which could be shown to be probably effectual, the legislature could, by further legislation, have required the company to construct such other fishways, we give no opinion, for reasons which will appear in our construction of the additional act.

4. In putting a construction upon the additional act, (*St.* 1848, c. 295,) it is important to note the date, and the circumstances under which it was passed. At that time the dam had been in operation some time, with the fishway prescribed, and proved to be unsuitable or insufficient to accomplish the proposed purpose of providing for the passage of the fish. It appears that the company required legislative aid to enable them to increase their capital stock. It seems that the legislature seized the opportunity to make a better provision for the

security of the fisheries, than that required in the act of incorporation had proved to be. This they did by a scheme to be proposed to the company by way of condition, and acceded to by them in legal form; a scheme entirely different from that proposed in the act of incorporation, and different from any which had been previously adopted in any similar case.

The legislature had the power to regulate the public right, and diminish it or release it, as the best good of the public, on the whole, might in their judgment require. Whether that public good, expected from the fishery, consisted in affording an additional article of food to the people, or an employment for labor, or otherwise, the legislature might well compare this with the public advantage, in affording increased profitable labor and means of subsistence, and various benefits, from building up a large manufacturing town, and decide as the balance of public benefit should preponderate. Of this they must judge. *Boston & Lowell Railroad v. Salem & Lowell Railroad*, 2 Gray, 1.

But the legislature stood in a more delicate relation towards the various riparian owners of fish rights above the dam. The extinction of the public right to have the fish pass the dam would deprive these owners of their several fisheries, which were in effect private property. Towards them, therefore, the public stood, in some respects, as trustees, and their beneficial interests could not honorably be disregarded. The plan, therefore, proposed by this enactment, was to substitute, for the public right intended to be provided for by the fishways required, a provision for the payment of damages by the company to every riparian owner of fishing rights along the river above said dam, giving them a remedy against the company where none existed before, for all damages occasioned by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam. It declared that the provision in the 7th section of the former act, requiring the making and maintaining of such fishways as the county commissioners should prescribe, should not be deemed a bar to such private claim for damages; implying that, but for this clause, such provision for fishways would have been a bar to any private claim for damages. It provides an easy and constitutional mode for every such private owner to obtain his damages, to be used, if the same should not be adjusted and paid by agreement, which each such private owner would have a right to make, in respect to his own several interest. It was the substitution of one onerous duty upon the company for another, more equitably and effectually to accomplish the same object.

To preclude all question as to the right of the legislature thus to impose a new obligation upon the company, it was provided that the act should not take effect until it should be in terms accepted at a meeting of stockholders called for that purpose, and authentic evidence thereof filed in the office of the secretary of the Commonwealth, for the information and benefit of all persons concerned, as well those individual riparian owners who might claim their rights under it, as those

persons who might afterwards acquire or hold shares in the stock of said company. This appears to us to be the direct meaning and construction of this enactment. It was not a new provision, requiring the better performance of a preëxisting duty; it was substituting a new species of indemnity to parties, where none in any form existed before, either by an action of tort at common law, or by a claim for damages under any statute.

Under these circumstances, it appears to us, especially after it has been acceded to by the company, and after they have paid a large sum of money in pursuance of it, that this enactment has in it all the elements of a contract, executed by one party and binding on the other.

5. The remaining question is whether the act of 1856 is justified by the provision in the Rev. Sts. c. 44, § 23, that acts of incorporation afterwards passed should be subject to amendment, alteration or repeal? That provision is, that every act of incorporation shall at all times be subject to amendment, alteration or repeal, at the pleasure of the legislature; provided, that no such act shall be repealed, unless for violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same.

The power of repeal is limited and qualified, and was so considered in the case of *Crease v. Babcock*, 23 Pick. 331.

Does this come within the power of the legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such lot from a third party; could the legislature prohibit the company from holding it? If so, in whom should it vest; or could the legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases — for extreme cases are allowable to test a legal principle — the rule to be extracted is this; that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damaged by the defendants' dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damaged in their several fisheries, and the defendant company had executed their part of the contract by the pay-

ment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and therefore that the said act was null and void, and this indictment founded upon it cannot be maintained.

Exceptions sustained.

DUFFEE v. OLD COLONY AND FALL RIVER R. R. CO.

1862. 5 *Allen (Mass.)*, 230.¹

BILL IN EQUITY by minority stockholder to restrain defendants, a Massachusetts corporation, from extending their road or from uniting with another railroad company.

The case was heard upon bill, answer, and demurrers. The material facts appearing on the bill and answer were as follows.

The defendants' charter was, by virtue of *Statute* 1830, *chap.* 81, subject to alteration, amendment or repeal, at the pleasure of the legislature. The charter authorized the construction of a railroad from Fall River to Boston; and the company has accumulated a large surplus fund by its business over that route. In 1861, the legislature passed an act authorizing the defendants to extend their road from their present terminus in Fall River to the Rhode Island line, and to connect with a railroad to be constructed from Newport, R. I., to the Massachusetts line. Under this act no part of the surplus can be used to build the extension, or to build the road in Rhode Island; but the capital stock may be increased two thousand shares. The act was to be void unless accepted by the corporation at a stockholders' meeting. It was accepted by a majority vote, against plaintiff's objection. In 1862, another act was passed, authorizing the defendant company, by a vote of its stockholders, to unite with the Newport and Fall River R. R. Corporation.

The Old Colony and Fall River R. R. Company has commenced to build its extension to the Rhode Island line; and has also entered into an indenture with the Newport and Fall River R. R. Company; whereby the latter company leases its road, when completed, to the former company for a term of ten years, at an annual rent; and the former company agrees to pay in advance the rent for the whole term, to be used for the purpose of building the road of the latter company. This arrangement was sanctioned by a vote of the stockholders.

C. I. Reed, (*E. Ames* with him,) for plaintiff. The question to be

¹ Statement abridged. — ED.

determined in this case is, whether, after a stockholder in a corporation has investigated the scheme stated in the charter, and become satisfied that the enterprise will be safe, and invested his money in it, a majority of the stockholders may against his will change the corporate purposes, either with or without legislative sanction, and apply his funds to the promotion of an enterprise in which he has no faith. This is what *St. 1861, c. 156*, authorizes to be done.

No legislative sanction could give authority to a majority of the partners in a firm, or the members of a voluntary association, to do this, because it would impair the obligation of the contract between the parties. In this respect, a corporation stands on no different ground. *Simpson v. Denison*, 10 Hare, 51. The shares are personal property, and the rights of the shareholder, so far as this case is concerned, do not differ from the rights of a partner. This is a private corporation; as much so as banking corporations which issue currency, or as turnpike or canal corporations. *Dartmouth College v. Woodward*, 4 Wheat. 518. *State Bank of Ohio v. Knoop*, 16 How. (U. S.) 380, 381. Angell & Ames on Corp. § 31, & *seq.* and cases cited. Private corporations have no political privileges. And without legislative sanction, it is plain that a majority of the members of the corporation could not make this change against the will of the minority. Angell & Ames on Corp. §§ 391–393, 537, and cases cited. *Salem Milldam Corp. v. Ropes*, 6 Pick. 32. Before *St. 1831, c. 81*, which provided that all acts of incorporation thereafter passed should be liable to be amended, altered or repealed, at the pleasure of the legislature, a majority could not do this even with legislative sanction. *Boston and Lowell Railroad v. Salem and Lowell Railroad*, 2 Gray, 1, and cases cited. Angell & Ames on Corp. §§ 391, & *seq.* 537. *Crease v. Babcock*, 23 Pick. 334. *Dodge v. Woppley*, 18 How. (U. S.) 331. *State Bank of Ohio v. Knoop*, 16 How. (U. S.) 369. *Curran v. Arkansas*, 15 How. (U. S.) 304. *Woodruff v. Trapnall*, 10 How. (U. S.) 190. *Planters' Bank v. Sharp*, 6 How. (U. S.) 301. *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133. *Allen v. McKen*, 1 Sumner, 276. *McCray v. Junction Railroad*, 9 Indiana, 359. *Stevens v. Rutland & Burlington Railroad*, 29 Verm. 548. This rule has frequently been applied in actions on subscriptions. But may a corporation apply money which has been paid in, to purposes the prosecution of which would prevent them from collecting unpaid assessments? Before that statute was passed, the state could no more authorize this change against the will of the minority than against the will of the majority, or of the whole body. The reason is, because the state could not pass a statute impairing the obligation of contracts. Railroad corporations are within this general rule. If English cases are thought to establish a contrary doctrine, it is to be remembered that in England parliament is omnipotent, and may abrogate contracts between corporations and individuals, and between the nation and individuals. With us it is different. We have written constitutions, which control legislative action. *Fletcher v. Peck*, 6 Cranch, 87. The

English cases hold that a court of chancery will restrain a corporation from using its funds to obtain from parliament an act changing its powers, if a single shareholder objects ; but will not restrain it from making the application, in cases in which the public may be interested. And when a railroad company applies to parliament for an extension of its power, it is now the settled practice, upon the bill of a single stockholder, to enjoin the use of the corporate funds in the prosecution of this object, but to refuse to enjoin the application itself. *Bagshaw v. Eastern, &c. Railway*, 7 Hare, 114. The ground on which the use of the corporate funds is enjoined is, that it would be in violation of the contract between the corporation and the stockholder. See *Lancashire, &c. Railway v. Northwestern Railway*, 2 Kay & Johns. 293, 310, and cases cited. And there is no weight in the objection that this would give one stockholder undue power ; because it is only in the execution of powers derived from their charter that the majority can control the single stockholder. When they undertake to transcend this, or to vary or change the contract, a single individual, clothed with the whole authority of the law, and with its whole machinery at his command, becomes supreme. Then may "one chase a thousand, and two put ten thousand to flight."

Undoubtedly the corporation is bound by the statute, by reason of its assent to it. This would have been the case even before the passage of *St.* 1830, c. 81. But that statute does not authorize the passage of an act like *St.* 1862, c. 149. The *St.* of 1830 was passed because it had become settled law that every act of incorporation was an irrevocable grant ; and thus corporations enjoy privileges not possessed by individuals. The public good frequently required legislation which would be inconsistent with the contracts of the state with corporations, in granting their franchises. This statute, therefore, reserved the power of amendment or repeal to the legislature, for public purposes, in order that the state might change contracts between itself and corporations. But the corporation has made another contract with its stockholders, which it has no right to violate, either without or with the assistance of the legislature. The former contract the state may change. It may impose new restrictions ; order the corporation to sound whistles, erect gates, make bridges, station flagmen, change the grade of the road at crossings, &c. And it may do these things against the consent of a minority, or a majority, or the whole body of the stockholders. The right does not depend at all upon their assent. But this does not give the state the power to make a change which will impair contracts made by corporations with third persons ; nor does it give to corporations the right to violate such contracts. See *Commonwealth v. Essex Co.* 13 Gray, 239 ; *Hamilton Ins. Co. v. Hobart*, 2 Gray, 547. The statute was not intended to touch such cases.

Inasmuch as the object of the statute was to authorize the legislature to make certain changes, as above described, against the will of corporations, the latter may be compelled to comply with the requirements of

the legislature, whether they will or not. But it is plain that the legislature could not compel the Old Colony and Fall River Railroad Company to build this new line of road. They might have done so at the time the charter was granted, as a condition of the grant; but they cannot do so now, because it would impair the rights acquired by the corporation and its stockholders. The same reason exists why the minority should not be so compelled.

The *St.* of 1830 is a mere reservation of authority by the state, and not the creation of a power. It was not intended to give to majorities in corporations any larger control over the minority, or in any way to affect the relations existing between a corporation and its stockholders. It confers upon the state no authority over corporations and their stockholders, which it did not always possess over citizens. Otherwise, its effect would be, in the present case, to import new terms into the contract; to devote the property of the stockholders to new purposes, aside from the contract; to make them partners in a new enterprise; to make the corporation liable for new debts; and to admit to the control and management of its affairs new members, against the plaintiff's will.

Before the passage of *St.* 1830, neither the legislature nor a corporation, nor both together, possessed the power of changing the purposes for which a corporation was created, against the will of a minority of the stockholders: How then could these two parties, neither of whom possessed this power, confer it upon one of them? Nor can it be maintained that this statute, construed in connection with any charter granted since its passage, constitutes a contract that the state may make any law which it pleases touching it. This is the ground of cases in New York. But the provisions of the constitution, which restrain the enactment of laws impairing the obligation of contracts, also enter as elements into the contract; and thus read, the statute means that the state may make any law which is constitutional. It only gave to the legislature authority to make such changes as would simply enlarge or diminish the privileges or restrictions set out in the charter and the statutes; but it gave no power to change the purposes for which a company was incorporated, against the assent of any of its members.

The borrowing of money and issuing of bonds by the defendant corporation were unauthorized. *St.* 1861, c. 156, § 2. Gen. Sts. c. 63, § 120. The contract with the Newport and Fall River Railroad Company was also illegal. It was a mere evasion of the statute, to enter into such a contract with a moonshine corporation, and call it a lease.

S. Bartlett and J. G. Abbott, (B. Dean with them,) for defendants.
[Argument omitted.]

J. H. Clifford, replied for plaintiff.

BIGELOW, C. J. We do not deem it necessary to consider the questions raised by the demurrer to the bill, nor to discuss the nature or extent of the jurisdiction of this court in equity over corporations, at the suit of one or more of their stockholders, in cases where there has been an excess or abuse of the power or authority conferred by legisla-

tive grants. In the view which we have taken of the merits of the case, these questions become immaterial.

The case for the plaintiff mainly rests on the single proposition of law, that a corporation established by the legislature of this commonwealth, by acts which, under *St.* 1830, *c.* 81, are subject to alteration, amendment or repeal, at the pleasure of the legislature, cannot engage in any new enterprise or enter upon any new undertaking, in addition to that contemplated by and embraced in the original charter of the company, against the consent of any one of its stockholders, although such new enterprise or undertaking is of the same kind with that for which the corporation was originally established, and is authorized, sanctioned and adopted by an express legislative grant, and by a vote of the majority of the stockholders duly ascertained according to law.

In endeavoring to ascertain whether this proposition can be supported on sound legal principles, it does not seem to us to be necessary to enter upon any extended discussion of the extent of the right reserved by the general laws to the legislature to modify or repeal the charters of corporations without or against their consent. No question arises here between the legislature and the corporation. The latter have assented, in the mode provided by law, to the change in their rights, powers and duties which have been created by the act set forth in the bill, and have thereby accepted the modifications of their original contract with the Commonwealth, which result from the new provisions of law which they have thus adopted and sanctioned. Nor are we called on to determine the effect which such a legislative act would have upon a previously existing executory contract entered into with the corporation; as, for instance, an agreement to subscribe for stock and to become a member of a corporate body, created or to be established for certain distinct and designated objects. No such question arises in the present case. The plaintiff had no executory agreement with the defendants at the time the act in question was passed by the legislature, or when it was approved and accepted by a legal vote of the corporation. He was then the absolute owner of shares, and as such was a constituent member of the body corporate, clothed with all the rights and privileges and subject to all the duties and obligations of a stockholder. These, therefore, constituted the extent and the measure of his responsibility to the corporation, and of their liability and legal obligations to him. In this view, the gist of the present inquiry seems to us to embrace a much narrower range than that which was taken in the very elaborate and extended argument submitted by the learned counsel for the plaintiff. It appears to us that when we shall have ascertained and defined with precision and accuracy the nature of the contract which subsists, under the statutes of this commonwealth, between a corporation and one of its members, solely by virtue of his being a proprietor of shares in the capital stock, we shall have gone very far towards a final adjudication of the rights of the respective parties, so far as they are involved in the present controversy.

We suppose it may be stated as an indisputable proposition, that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter. A holder of shares in an incorporated body, so far as his individual rights and interests may be involved in the doings of the corporation, acting within the legitimate sphere of its corporate power, has no other legal control over them than that which he can exercise by his single vote in the meetings of the company. To this extent, he has parted with his personal right or privilege to regulate the disposition of that portion of his property which he has invested in the capital stock of the corporation, and surrendered it to the will of a majority of his fellow corporators. The *jus disponendi* is vested in them so long as they keep within the line of the general purpose and object for which the corporation was established, although their action may be against the will of a minority, however large. It cannot, therefore, be justly said that the contract, express or implied, between the corporation and the stockholders is infringed or impaired by any act or proceeding of the former which is authorized by a majority, and which comes within the terms of the original statute creating and establishing their franchise, and conferring on them capacity to exercise control over the rights and property of their members. On the contrary, the fair and reasonable implication resulting from the legal relation of the stockholder and the corporation is, that the majority may do any act either coming within the scope of the corporate authority, or which is consistent with the terms and conditions of the original charter, without and even against the consent of an individual member.

Such being the nature of the contract which subsists between the corporation and each of its members, we have only to inquire, in the present case, whether it has been in any respect violated by the present defendants. The answer to this inquiry will be found in the interpretation which is put on that clause of the general laws of this commonwealth already cited, by which a right is reserved to the legislature to amend, alter or repeal any act of incorporation which has been established by its authority since the enactment of that provision in *St.* 1830. Whatever may be the extent of the authority which is thereby retained by the legislature to modify or change the charters of corporations without or against their consent, there would seem to be no reason to doubt that, with the concurrence of the corporation manifested in the mode pointed out by law, the legislature may make any alteration in or addition to the power and authority conferred by the original act of incorporation, and not foreign to the purposes and objects for which it

was enacted, and which it was designed to accomplish, which may seem to be expedient or necessary. No breach of contract would be thereby occasioned. Such action would be in precise accordance with the terms on which the grant of the franchise was made. In creating a corporation, no contract is made by the legislature with the individual members or stockholders, any further than they are represented by the artificial body which the act of incorporation calls into being. They have no other rights except those which exist or grow out of the constitution of the body corporate of which they are members. To this only can we look, in order to ascertain whether there has been any breach of contract or violation of chartered rights. It constitutes, of itself, the contract by which the rights of all parties are to be governed. When, therefore, it is expressly provided between the legislature on the one hand and the corporation on the other, as part of the original contract of incorporation, that the former may change or modify or abrogate it or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the legislature with the corporation, that the original act of incorporation should undergo no change except with his assent. Such a position might be asserted with more plausibility, if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might perhaps be maintained that there was a strong implication that the charter should remain inviolate, and that the holders of shares invested their property in the corporation relying upon a contract entered into between it and the legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: by the parties to the contract, the legislature on the one hand and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party. In such case, all persons claiming derivative rights or interests under the original contract, with notice of its terms, would be bound by the amendment or alteration to which the parties should agree. Take an illustration, similar to one put by the learned counsel for the defendants. Suppose a copartnership or joint stock company, consisting of ship-owners, to be formed for a specific purpose, to carry on, for instance, a series of voyages to India, with a proviso that at any time, by mutual assent of the parties, the terms of the original agreement might be

modified or changed; it being also stipulated that owners of merchandise might share in the contemplated enterprise by sending goods to the ports or places to which the ships might be sent in pursuance of the agreement. Can there be any doubt that under such a contract the shipper of goods would be bound by any alteration in its terms to which the original parties should agree, and that if, in pursuance of such alteration, the destination of their vessels should be afterwards changed by the owners, so that voyages to China were substituted instead of to India, this change in the terms of the agreement would constitute no breach of contract towards the shippers of goods? If it be not so, then it would follow that a sub-contractor would not be bound by a stipulation in the principal contract under which he undertook to act, and of which he had due notice. It is a mistake, therefore, to say that the contract of a stockholder with a corporation established under our statutes binds the latter to undertake no new enterprise and engage in no business or operation other than that contemplated by the original charter. This interpretation puts aside the express provision authorizing an amendment or alteration of the act of incorporation, and gives it no effect as against a stockholder without his assent, although he bought his stock or subscribed for his shares subject to the legal effect of such a stipulation. The infirmity of the argument in behalf of the plaintiff is, that it admits that an amendment may be legal and valid as to the corporation, if they assent to it by a vote of the majority, while at the same time it sets it aside as against the stockholder who refuses to sanction it, on the ground that as to him it is illegal and void. But we cannot see how the amendment can be said to be legal and illegal *uno et eodem flatu*. If it is valid as to the corporation, for the reason that they have accepted and approved it according to the provisions of their charter, it would seem that it must also be binding on the stockholder, who has agreed that his rights and interests in the corporation shall be regulated and controlled by a vote of a majority, acting in conformity to the original constitution of the corporation, and within the scope of its corporate powers. The real contract into which the stockholder enters with the corporation is, that he agrees to become a member of an artificial body which is created and has its existence by virtue of a contract with the legislature, which may be amended or changed with the consent of the company, ascertained and declared in the mode pointed out by law. Having, by virtue of the relation which subsists between himself and the corporation as a holder of shares, assented to the terms of the original act of incorporation, he cannot be heard to say that he will not be bound by a vote of the majority of the stockholders accepting an amendment or alterations of the charter made in pursuance of an express authority reserved to the legislature, and which by such acceptance has become binding on the corporation. Such we understand to be the result of the adjudicated cases. In *Crease v. Babcock*, 23 Pick. 342, it was expressly decided that corporators, by accepting a charter, directly agree to adopt the provision

reserving to the legislature the right to amend, alter or repeal the act of incorporation as a constituent part of their contract; and it has often been decided, under similar provisions in the statutes of other states, that amendments or changes, either abridging the corporate authority or enlarging and extending it so as to embrace new enterprises and to incur additional burdens and liabilities, when duly adopted by the corporation, are valid and binding on a dissenting minority, as well as on those corporators by whose votes the amending act has been accepted and approved. *Buffalo, &c. Railroad v. Dudley*, 4 Kernan, 336, 348, 354. *Northern Railroad v. Miller*, 10 Barb. 282. *Meadow Dam Co. v. Gray*, 30 Maine, 547. *Oldtown, &c. Railroad v. Veazie*, 39 Maine, 580. *Binet v. Alton, &c. Railroad*, 13 Illinois, 504.

It was urged, as a grave objection against the doctrine above stated, that it puts the minority of the stockholders of a corporation entirely within the control of the legislature and a majority of the stockholders, and that there would be no limit or restraint placed on the exercise of the power, so that corporations might be diverted to purposes and objects wholly foreign to those for which they were originally established, and stockholders might be made to participate against their will in undertakings which they never contemplated and which they deemed inexpedient or ruinous. If this be so, it is a consequence of which no stockholder can reasonably complain, because it is a result which flows from the contract into which he has voluntarily entered. But we are not prepared to admit the soundness of the objection. A restraint or limit on the power of the legislature to alter or amend a charter, even with the consent of the corporation, may perhaps be found in the doctrine recognized in some of the English cases, that the enlargement of corporate powers shall not be extended so as to authorize enterprises or operations different in their nature and kind from those comprehended within the terms of the original charter, but shall be confined to purposes and objects *ejusdem generis* with those for which the corporation was primarily granted. See *Ware v. Grand Junction Water Works*, 2 Russ. & Myle, 470; *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142. But however this may be, no such question arises in the present case, inasmuch as the additional acts, the validity of which is called into controversy by the plaintiff, do not empower the defendants to engage in any undertaking essentially different in kind from that which was embraced in the original acts by which their corporate existence under their present name was authorized and established.

So far as any argument against the right of the legislature to amend or alter the charters of corporations under our statutes is drawn from the peril to which it exposes the property and interests of dissenting minorities of stockholders, we cannot deem it of any practical weight or importance. The good faith of the legislature and the self-interest of the majority will ordinarily be a sufficient protection against any wanton or oppressive use of their power. Against any dishonest or fraudulent abuses of it, a sufficient remedy can always be had in the courts of justice.

It may be well to add, in order to avoid misapprehension, that we do not intend to say that the legislature have any power to change or modify an act of incorporation in such a way as to affect in a material particular a contract which they have entered into with a third person. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract. It was so decided by this court in *Hamilton Ins. Co. v. Hobart*, 2 Gray, 547, where it was held that an act of the legislature was void which made a new party to an executory contract of insurance without the assent of the assured. All that we mean to determine is, that the obligation of the contract which subsists between the corporation and a stockholder, by virtue of his being a proprietor of shares in the corporate stock, is not impaired by an act of the legislature which amends and alters the charter and authorizes the corporation to undertake new and additional enterprises of a nature similar to those embraced within the original grant of power, if such act is accepted by a majority of the stockholders in the mode provided by law.

The only other ground on which the plaintiff seeks to maintain his bill is, that the indenture entered into by the defendants with the Newport and Fall River Railroad Company, for the lease of the road belonging to the latter company to the defendants, is a violation of the second section of the act of 1861, authorizing the extension of the defendants' road, which prohibits them from using any part of their reserved funds to build said extension or any portion of the road in Rhode Island. But on looking at the terms of the instrument it appears to us to be a lease in regular form for a term of ten years of the road in Rhode Island to the defendants, in consideration of a stipulated rent *per annum*, payable in advance, and of an agreement by the defendants to perform all the transportation of persons and freight upon and over the road in Rhode Island. Such a contract seems to us to be fully authorized by Gen. Sts. c. 63, § 115; and there being no allegation or proof that it was made collusively, for the purpose of evading the prohibition of the expenditure of the surplus or reserved funds belonging to the defendants, or that such will be the effect of carrying out the stipulations in the indenture, we are of opinion that the plaintiff fails to support this part of his case.

Bill dismissed.

ZABRISKIE v. HACKENSACK AND N. Y. R. CO.

1867. 18 *New Jersey Equity* (3 C. E. Green), 178.¹

THIS case was argued upon a rule to show cause why the defendants should not be enjoined from mortgaging the property of the company, or from expending its funds in the construction of a road not authorized by their charter, but being an extension of the original road, authorized by a supplement to their charter.

C. H. Voorhis, for complainant.

Knapp, and *Hopper*, for defendants.

ZABRISKIE, CHANCELLOR. The Hackensack and New York Railroad Company was incorporated in 1856, with power to construct a railroad from Hackensack to the Paterson and Hudson River Railroad, with a capital stock of two hundred thousand dollars, and with power to mortgage its road and lands, franchises and appurtenances, to the amount of fifty thousand dollars. Under this act, it laid out, located, and built a road five miles in length, terminating at Essex street, in Hackensack, within one mile of the court-house, as required by the charter. It borrowed thirty thousand dollars, for which it gave a mortgage upon the road and its equipment, franchises, and other property. By a supplement to this charter, passed March 12th, 1861, it was authorized to extend the road northwardly to Nanent, on the Erie railway, in the state of New York, a distance of about twelve miles, to increase the capital stock to any extent required, and to issue bonds to the amount of two hundred and fifty thousand dollars, which, in the words of the act, were "for the construction and equipment of the road to be constructed under this act, and to secure the payment of said bonds, the said company shall have power to mortgage the said road, with its franchises and chartered rights."

In 1861, the company extended its road under this supplement to a point on Passaic street, in the village of Hackensack, more than a mile from the court-house, the length of the extension being about a mile. After this, it executed a new mortgage upon the whole road, as extended, and its equipments, and its franchises and chartered rights, to secure the payment of ten thousand dollars. No new stock was issued for this extension.

The company has recently, under the supplement of 1861, laid out and located another extension for about a mile and a half north of the present terminus, reaching from Hackensack to New Bridge, and has made contracts for the construction of it, and has, by resolution, determined to make a new mortgage to cover the whole road, as it will be when finished to New Bridge, with its equipments and appurten-

¹ Argument and part of opinion omitted. — ED.

ances, and the chartered rights and franchises of the company, to secure one hundred bonds of one thousand dollars each, for the purpose of paying off the two mortgages which are now on the road; for relaying with new rails and ties the road first built, and furnishing it with the necessary equipment, which is now deficient for its business; and for constructing and equipping the extension to New Bridge.

The complainant is a stockholder in the company; and of nine hundred and thirty shares of capital stock issued, for one hundred dollars each, he owns three hundred and twenty-four. He applies for an injunction to restrain the defendants from constructing the extension to New Bridge, and from executing the mortgage proposed.

He opposes the extension, on the ground that it is a different enterprise from that for which his stock was taken, and the money paid, and that neither the directors, nor a majority of the stockholders, can compel him to embark his capital in any undertaking but the one for which it was subscribed and paid.

[The learned Judge *held*, that the extension to Nanent, authorized by the act of 1861, had not been assented to by a majority of the stockholders.]

The extension authorized by the act of 1861, is a radical change in the object of this corporation; it is an enterprise entirely different from that in the charter. That was to construct and operate a railroad from Hackensack to the Paterson railroad, at Boiling Spring, an easy and almost direct route to New York; it was from a thriving village, the county town of Bergen county, over a level country, and only five miles in length, as shown by the return of its location. The extension would be about twelve miles in length, through an uneven country, mostly, if not wholly, agricultural; with no village, except the very small one at New Bridge, on its route; and it runs into the state of New York some distance, and terminates at a point on that part of the Erie railway which the company have abandoned for regular traffic, and on which few trains are run. It is an entirely different enterprise.

The question here is, can this company, either with or without the consent of a majority in interest, of its stockholders, compel the complainant to embark capital subscribed for the first enterprise, in this new one, entirely different.

Since the Dartmouth College case, in the Supreme Court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the state courts, that a charter, granted by the legislature to a corporation, is a contract between the state and the corporators, and that the state can pass no act to take away or impair any of the franchises or privileges granted by it. The company, or artificial person thus created, and its property, is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons and their property are; provided they are not such as to take away or impair any of the franchises plainly granted by the charter. This doc-

trine did not prevent the legislature from conferring new privileges upon any corporation, to be accepted at its own election.

It is also settled, upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incorporated into the constitution of the United States, and of almost every state in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed.

[After referring to *Natusch v. Irving*, to *Kean v. Johnson*, 1 Stockton, N. J. 401, and other cases, the opinion proceeds:]

After the effect of the rule established in the Dartmouth College case began to be felt in the states, it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted, and that provisions incautiously inserted, too much restricted the power of future legislatures; and that the laws, which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the legislature of many states, by degrees and successively, adopted the practice of inserting in acts granting franchises, that they might alter, modify, or repeal the act; and also, by general law, provided that all acts of incorporation thereafter passed, should be subject to such alteration and repeal.

The provision is contained in the general act of this state, passed in 1846, (*Nix. Dig.* 152, § 6.)¹ that such charters should be subject to alteration, suspension, and repeal, in the discretion of the legislature. This and all similar special and general provisions were intended for the purpose specified; to give to the legislature the clear right, at their pleasure, to alter or repeal the acts of incorporation. The state, without this, could have done it with the assent of the corporators. They could give them property; they could add to their powers or privileges. But they could not take away any power, privilege, or franchise, conferred by the act, nor compel them to exercise any new power or franchise conferred.

¹ *Rev. p.* 178, § 6.

Besides this general law of the state, the charter of the defendants contains this provision, that "the legislature may, at any time, alter, modify, or repeal the same."

The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state, for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before.

It was to avoid the rule in the Dartmouth College case, not that in *Natusch v. Irving*, that the change was made. The words limit the power to that object.

On general principles, and the settled rules of construction, I would hold this to be the effect, and only effect, of the provision in the general act and in the charter of the defendants, without any hesitation, were it not for a series of decisions by most respectable courts, which hold that this provision obviates the effect of the rule in *Natusch v. Irving*, and *Kean v. Johnson*, and enables a majority of the corporators in all charters subject to a like provision, to change, by legislative permission, and within certain limits, the object and purpose of the corporation. They hold that the contract between associate corporators, that they will confine their business to life insurance, is changed by legislative permission to engage in marine insurance, or a contract to join in constructing a railroad from New York to Newark, can be changed to one from New York to Elizabeth by legislative consent. The reasoning is founded on the fact that the subscription for the stock, which is the contract, was made as in this case under a charter which authorizes a road from the Paterson road to Hackensack, and authorizes the legislature to alter and modify the act. And from this they infer that it is a contract to join in building any road that the legislature may, by such alteration, authorize the company to build; and that such authority, or additional privilege, may be accepted by a majority of the corporators.

So far as the alteration is made by the legislature, in a way to be compulsory on the corporation, this is correct; as, if they should require the company to build a double track, or widen the draws in a bridge, or exact less fare or toll; these would be within the contract, or would be annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration.

But if the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise, it is not within the condition to the subscription. The only construction to be given is, that the legislature may alter, not that the stockholders may,

as between each other. The case of *Natusch v. Irving* was decided upon this very ground. The act of Parliament had given the company *the power* to embark in marine insurance, but the consent of all the parties was still held necessary. The plain object of the reservation in this case was to give the legislature, not a bare majority of the stockholders, power.

This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of the decisions in other states is against it.

In the case of the *Oldtown and Lincoln R. Co. v. Veasie*, 39 *Maine R.* 571; the act of incorporation, passed March 8th, 1852, authorized not less than eleven thousand, nor more than fifteen thousand shares. Veasie, August 13th, 1852, subscribed for one thousand shares; only nine thousand five hundred shares were subscribed. A supplement, passed September, 1853, under the power reserved to alter, fixed the capital at not less than eight thousand, nor more than twenty-five thousand shares. This was accepted by the directors. Veasie was sued for his subscription, and objected on the ground that until the supplement was passed, the number of shares required to constitute the company not having been subscribed, he could not be sued for his subscription, and that the legislature under the power reserved, although they might alter the charter, could not affect the rights of the stockholders between themselves, or change their contract with the company.

The court held that he was not liable under the original act, to be sued until eleven thousand shares were subscribed for, and that the power to amend did not authorize a change in the rights or liabilities of the corporators between themselves.

Chief Justice Shepley says (p. 580): "The legislature might as well have attempted to alter a contract between the corporation and one of its members respecting the construction of the road, as a contract respecting any part of its capital. If a corporation, being party to a contract with one of its corporators, might, by the assistance of the legislature, absolve itself from the performance of any part of the contract, it might from the whole, and might require payment of the money subscribed, without allowing the subscriber to derive any benefit from it. It is the charter only, and the rights and liabilities of the corporators as such in consequence thereof, that can be varied by an act of the legislature, and not the private contracts made between the corporation as one party, and its corporators as the other."

Now in this case, the private contract between the stockholders and the corporation, or between them mutually, on subscribing for the stock, was that their enterprise was the road from the Paterson railroad to Hackensack, and the power reserved was not to authorize any of the parties to this private contract, at their pleasure, to violate it. The supplement of 1861 does not *require* the extension to be built; it only authorizes it at the option of the corporation. The words are,

“it shall be lawful for said company to extend their railroad.” And it is held in England, where the courts by mandamus compel a company to construct the road it is incorporated to construct, that an act giving the privilege of extension is not obligatory on the company, and the mandamus is in such case refused, *York and Midland R. Co. v. Regina*, 1 *Ellis & Bl.* 858; in which the Exchequer Chamber reversed the decision of the Common Bench, in 1 *Ellis & Bl.* 178, in the same case.

In New York a different rule has been established, and it is held that the power to alter will authorize the company, by consent of the legislature, to extend its enterprise without the consent of the stockholders.

[Here the learned Chancellor cited, and commented upon, various New York cases.]

The Supreme Court of Massachusetts has followed the decisions in New York, and in the well considered and well argued case of *Durfee v. The Old Colony R. Co.*, 5 *Allen* 230, arrived at the conclusion that the reserved right to alter and repeal authorized a company to engage in a new enterprise, without the consent of all the shareholders. The reasoning of the able counsel who combated this position contains the best exposition of the law that I have found anywhere. The reasoning of Chief Justice Bigelow, in delivering the opinion of the court, does not convince me. He places the decision upon principles not acknowledged in this state, and relies upon the two cases in Maine, cited above, as well as those in New York, as supporting his view. He assumes (on p. 244,) that it is the object of the provision, that an amendment may be made by the consent of *both parties*, the legislature on the one side, and the corporation on the other; the former expressing its assent by a legislative act, and the latter by a vote of the majority of stockholders; and observes “that it is nothing more than the *ordinary* case of a stipulation that one of the parties to a contract may vary its terms, with the consent of the other contracting party.”

Now in this state it is settled that an alteration made by the legislature, under this reserved power, is valid and binding, without the consent, and against the will of the corporation, and all its members. The two decisions in the Court of Errors, not yet reported,¹ upon the charters of the Morris and Essex Railroad Company, and of the Jersey City and Bergen Railroad Company, settle that the legislature may, against the will of the companies, change the mode of taxation prescribed in their charter for one more burthensome.

And the rule of the common law as to contracts, adopted here, gives the power to the parties, where both assent, to alter any contract without the stipulation for that purpose, which would seem from the language of the opinion, to be *ordinarily* inserted for it in Massachusetts. Such stipulation is seldom or never made in New Jersey.

This view, that the object of the reserved power was to give the

¹ Since reported in 2 *Vr.* 521; *Id.* 575.

majority of the corporators the power to control the minority, with the consent of the legislature, has never been adopted in this state. The act of Massachusetts, *Statutes* 1831, *ch. LXXXI.*, to which reference is made, contains no provision as to consent of the stockholders, but is a pure, simple reservation of power, like the act of New Jersey.

The decisions in the cases of *Banet v. Alton and Sang. R. Co.*, 13 Ill. 504, *The Pacific Railroad v. Renshaw*, 18 Missouri 210, *The Pacific Railroad v. Hughes*, 22 Missouri 291, hold that the majority of the stockholders, by authority of the legislature, may make a change, provided it is not great or a radical one. They, in express terms, say that a change like this would not be warranted, and so far as of authority, are on the side of the complainant.

But the principle on which they are decided is wrong; and if it is once conceded that a majority of the corporators may, by authority from the legislature, change the object of the enterprise in small things, there is no principle of law by which they can be restrained in any a little larger, or in the character of the whole work. The same principle will lead the courts of Illinois and Missouri, as it did those in New York, to allow radical changes, and must, if consistently applied, allow a charter for a railroad to be used for banking or insurance business, or for a canal, theatre, brewery, or beer saloon.

There is no other alternative to the proposition, that while the power reserved authorizes the legislature, within certain limits, to make such alterations as they choose to impose, it gives no authority, when the legislature does not impose them, for the majority to adopt such alterations or enter upon such enterprises as are allowed by the legislature. Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change.

In some cases there might be room for doubts, but in this case there can be no hesitation in saying that a railroad of seventeen miles from the Paterson road to Nanent, is a change and substitution of one work for another, and not an alteration of the road to Hackensack. They are substantially two different enterprises.

Again, the power is to alter or modify the act, and the true construction of this I hold to be, an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fare,

or the amount to be taken. But the legislature had no right to impose upon the company any other duty, or anything involving any other duty, than that attending the building a railroad from the Paterson road to Hackensack; anything in the manner of doing that they had a right to change. They could not oblige it to dam and drain all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Naurent. They could as well oblige it to run to the Pacific. We must keep in mind that by the decisions in New Jersey the company need not accept the alterations; they are bound by them without acceptance if within the power reserved.

By a wider construction of this power any of the main lines of railroad running through the state, incorporated since 1846, or by an act which has in it the power of alteration, may be compelled to build and run a branch to any village or place near that route, that the legislature may direct. It must be held that the power to alter and modify does not give power to make any substantial additions to the work.

Again, the act of 1861 does not, in fact, alter or modify the act of 1856 in any one thing embraced in it. That act, and every power and franchise granted by it, and any duty it imposed, remains the same. And the defendants can now go on under it precisely as if the supplement had not been passed. The company is authorized to construct another road; it is not compelled to do it. If it builds it, or if it does not, its old charter remains with all its franchises and privileges intact, and no new burthens imposed, except so far as it assumes them. This is in no sense of the word an alteration of the charter. It would be as absurd to say that an owner had *altered* his house, who had built a larger one on an adjoining lot. And until the legislature have made a valid alteration of the charter, the rights of each stockholder are as held in *Kean v. Johnson*; he can prevent all the others from changing or abandoning the work.

The supplement of 1861 is a perfectly valid and constitutional act. It is a grant of privileges that the legislature have a right to grant, as they could grant to this corporation the right to conduct banking or insurance business, or to run a ferry across the North river; but the company is restrained by the law of corporations and partnerships, from expending the money or using the credit of the corporation in such enterprises, unless every shareholder consents.

The extension to Passaic street, both because it comes within the grant in the charter, and more especially because every shareholder must be held to have consented to it by acquiescing in its construction and maintenance for years, must be decided to be lawful.

The defendants must be restrained from extending the road beyond its present terminus at Passaic street, and from expending any money of the company to pay for any such extension, or from giving any mortgage for the cost of such extension.

There is no foundation for an injunction against a mortgage for any

lawful object, on either part of the road. There is great doubt whether a mortgage on either of the two parts of the road heretofore constructed, for the cost of the other, would pass the franchises of the company in such mortgaged part, but it would be valid as to the property other than franchises, which the company can mortgage without any special power. And besides, the bonds of the company, or its lawful contracts, would entitle the holder to recover upon them, and under the judgment, by the act of 1858, (*Nw. Dig.* 719,¹) the whole road and franchises could be sold. The complainant, therefore, cannot be injured by a mortgage, whether valid or not, upon any part of the road.

ASHUELOT R. R. CO. v. ELLIOT.

1873. 52 *New Hampshire*, 387.

1878. 58 *New Hampshire*, 451.²

BILL IN EQUITY, by railroad corporation and certain stockholders, to redeem mortgages executed by the corporation, in 1851 and 1855, to Elliot as trustee for bondholders. The plaintiffs claimed the right to redeem by paying the bonds. The defendant denied the existence of the right to redeem.

In Feb., 1861, peaceable possession of the road was (in accordance with a vote of the company) given to Elliot as trustee, and he has ever since managed it, and received its entire income; but he has never published the notice required by Gen. Stats. Ch. 122, Sect. 14.

During the same month of February, 1861, in accordance with a vote of the stockholders, a lease of the road was executed to the Cheshire Railroad.

July 4, 1861, the legislature passed an act, the first section of which provides that said mortgages, and all votes of the company in relation thereto and in relation to giving possession to the trustee, are confirmed.

Section 2 is as follows:

“SEC. 2. *Be it further enacted*, That in case said mortgages be not paid or discharged within one year from the passage of this act, William Haile and all other owners of the bonds aforesaid, or their successors, are hereby made the perpetual assigns and substitutes of said Ashuelot Railroad Company, with power to do any and all things as fully and completely as said company could have done before its insolvency, it

¹ *Rev.*, p. 945.

² Statement abridged. Portions of opinions omitted. The greater part of the argument is omitted.—ED.

being the intent and meaning of this act to transfer the corporate powers and duties of said company from the stockholders to the creditors of the same, in perfection and satisfaction of the mortgages above described and said company's votes in relation thereto.

"And it is also provided, that the bonds aforesaid shall hereafter be held and accounted as the sole paid up shares of the Ashuelot Railroad Company, and shall constitute its entire capital, and the owners of the same shall be entitled to share certificates respectively upon the surrender of their bonds aforesaid, subject to the laws of this State."

July 6, 1866, an act was passed authorizing Elliot, as trustee, to sell the mortgaged property at public auction; and providing that upon such sale and conveyance the railroad, &c., "shall become and be invested in the purchaser."

Cushing, for defendant. I. The acts of the State of New Hampshire, of July 4, 1861, and July 6, 1866, have at least this effect: they give the sanction of the legislature to the mortgages, to the entry for condition broken, and to the foreclosing of the mortgage. Section second of the act of 1861 substantially enacts that the mortgage shall be foreclosed in one year from its passage, and also makes provision for a new corporation to take the place of the old one. The act of 1866 goes upon the ground that the mortgage is foreclosed, and, in providing for the sale, provides that all the proceeds and all the property of every kind held in trust by the trustee shall be paid over to the bondholders, thus treating them as the absolute owners, and entirely ignoring any right of the corporation to redeem. In so far as the franchise to be a corporation is concerned, and which it is said cannot be a subject of sale and transfer except by some positive provision of law, provision is made in the first of these acts for its transfer to the bondholders, and by the second for its transfer to the purchaser, whether the Cheshire Railroad or otherwise. So far, therefore, as the authority of the State is concerned, the mortgage and its complete foreclosure are fully recognized and legalized by these acts. *Hall v. Sullivan Railway* cited 2 Redfield on Railways 465, ed. of 1869.

[Remainder of argument omitted.]

Perley, for plaintiffs. The mortgage is not foreclosed.

I. It is not foreclosed under the general laws of the State. Elliot has not entered under process, nor taken peaceable possession, and advertised, as is required, to foreclose a mortgage of real estate; nor has he pursued the course prescribed for the foreclosure of a mortgage of personal estate. In cases where the provisions of the statute prescribe the mode of foreclosure, those provisions govern the foreclosure. In other cases, the supreme court have general equity jurisdiction to foreclose.

II. The mortgage is not foreclosed by or under the private act of July 4, 1861.

1. That act undertakes to foreclose the mortgage by the mere lapse of one year from its passage, without notice of any kind, without a

sale, without requiring possession of the road to be taken and held, and without any bill or other legal process. It is not a legislative, but a judicial act. It is, in substance and effect, a judicial decree, that the mortgage should be foreclosed if the mortgage debt were not paid in one year: and this is exactly the decree that a court of equity would have made on a bill to foreclose the mortgage; for a decree of foreclosure in equity follows the statute in giving one year to redeem, unless there is some reason to vary the general rule. The act is in this respect a clear and flagrant usurpation of the legislative upon the judicial department of the government; is beyond the scope of legislative authority, and in violation of the bill of rights. Bill of Rights, art. 38.

For this reason, — because the act undertakes to decide a particular cause by a new rule not known to the general law of the State, instead of leaving the parties to settle their rights in regular proceedings, according to the general law, — the act is void, and no right can be derived under it. It is not the case where a new remedy is given by a general law. No remedy is provided by which the parties can show and defend their respective rights. It is not a remedy at all, but a decision and final disposition of that particular cause. Neither of the parties can resort to any provision of the act for any hearing or inquiry that could give any remedy under the act. It was a decision, in that individual case, that there was a valid mortgage; that there was a mortgage debt, and a right to redeem; and it was a decree declaring that the mortgage should be foreclosed if the debt were not paid in one year, precisely as if the legislature were a court inquiring into the facts of the case, deciding the legal rights of the parties, and giving a final judgment establishing their rights, and decreeing the manner in which they should be enforced. The authorities are numerous, and, so far as we have seen, unanimous, that, under a constitution like ours, such an act is void, because it is a judicial, not a legislative act. *Merrill v. Sherburne*, 1 N. H. 199-203; *Howard v. Bugbee*, 24 Howard 461; *Routson v. Wolf*, 35 Mo. 174; *Dodge v. Woolsey*, 18 Howard 331; *Goenen v. Schroeder*, 8 Minn. 387; *Denny v. Mattoon*, 2 Allen 361; *Bruffett v. The Railroad, &c.*, 25 Ill. 353; *Cornell v. Hichens*, 11 Wis. 353; *Robinson v. Magee*, 9 Cal. 81; *Dikeman v. Dikeman*, 11 Paige 484; *The People v. Hays and the City of San Francisco*, 4 Cal. 127; *Robinson v. Howe*, 13 Wis. 341; *Pearce v. Patton*, 7 B. Monroe 162; *Dubois v. McLean*, 4 McLean 486; *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Bryson v. Bryson*, 44 Mo. 232; *Orton v. Noonan*, 23 Wis. 102; *Conway v. Cable*, 37 Ill. 82; *Fletcher v. The Rutland Railroad*, 39 Vermont 633. There have been some decisions, of doubtful authority, that the legislature may confirm an equitable title by a private act removing technical and formal objections to the equitable title. But this act, instead of confirming an equitable title, takes away an equitable right, — that is to say, the right in equity of the mortgagors to redeem, according to the law of the State.

2. The act impairs the obligation of the contract between the parties to the mortgage.

Under the mortgage, the railroad had the right to redeem by paying the mortgage debt. This right to redeem would remain until it was barred, according to the terms of the mortgage and the law of the land. It was by the contract in the mortgage that the mortgagors had the right to redeem. The right would belong to them as part of the contract implied in the mortgage, though it had not been secured by the express terms of the mortgage. But the mortgage expressly reserves "to the mortgagors all the rights and privileges of redeeming said property provided by the laws of the State of New Hampshire." By the laws of the State, nothing less can be meant than the *general laws* of the State; not a single private act, taking away the right itself reserved of redeeming according to the laws provided for redeeming mortgages *by the laws* of the State. *Bronson v. Kinzie*, 1 Howard 311; *McCracken v. Hayward*, 2 Howard 608; *Woodruff v. Trapnall*, 10 Howard 190; *Curran v. Arkansas*, 15 Howard 304; *Bruffett v. The Railroad*, 25 Ill. 353; *Cornell v. Hichens*, 11 Wis. 353; *Robinson v. MaGee*, 9 Cal. 81.

3. If the legislature had the right to repeal, alter, and amend the act incorporating the railroad, they could not, by the exercise of the right, impair the obligation of a contract, made by or with the road, before the repeal, alteration, or amendment. This contract, made by and with the road, was a valid contract, made under the authority of the State, and the State had no more authority to impair it than a contract made directly by the State herself. The authorities on this point are entirely decisive. *Bruffett v. The Railroad*, 25 Ill. 353; *St. Louis v. Russell*, 9 Mo. 507; *Smith v. Morse*, 2 Cal. 524; *Benson v. The Mayor of New York*, 10 Barb. 223; *Slack v. The Railroad*, 13 B. Monroe 1; *Dodge v. Woolsey*, 18 Howard 331; *Bank v. Debolt*, 18 Howard 380; *Bank v. Thomas*, 18 Howard 384; *Bank v. Skelly*, 1 Black 436; *Van Hoffman v. Quincy*, 4 Wallace, 535; *Hawthorne v. Calef*, 2 Wallace 10; *Conant Van Schaick*, 24 Barb. 87. Here, however, was no repeal, alteration, or amendment of the charter. The act had no more effect on the charter than a judicial decree of foreclosure would have had. The charter, and all the provisions of it, remained exactly as before: no new power was given, nor any power taken away or changed.

4. The act is also in violation of the article in the bill of rights, which declares that "no subject shall be deprived of life, liberty, or estate, but by the judgment of his peers and the law of the land." Bill of Rights, art. 18.

[Remainder of argument omitted.]

Lane (one of plaintiffs) *pro se*.

[Argument omitted.]

DOE, J. I. [The court *held*, that the publication of notice was essential to the foreclosure of a mortgage in the second mode provided

by Gen. Stats. Ch. 122, Sect. 14, which is peaceable entry, one year's possession, and publication of notice. Hence it was decided that the mortgage had not been foreclosed under the general law of the State.]

II. As to a foreclosure, aided or effected by the acts of July 4, 1861, and July 6, 1866, we are not aware that, since the decision of *Merrill v. Sherburne*, 1 N. H. 199, there has been any reason to regard such a point as doubtful in this State. It would be a matter of regret if there could be any uncertainty as to the constitutional law on such a subject. For reasons so clearly and forcibly stated in the plaintiffs' briefs that there is no occasion to enlarge upon them, this bill may be maintained, notwithstanding the acts referred to.

[Remainder of opinion omitted.]

Case discharged.

Subsequently there was a motion for a rehearing. In support of this motion, counsel argued that the acts of 1861 and 1866 were constitutional under the power reserved to the legislature of altering and amending the chartered rights of the Ashuelot Railroad Company. The original charter provides that the legislature "may alter or amend the provisions of this act" for cause assigned, and upon notice to the corporation; "and may repeal this act for a violation thereof."

G. A. Torrey, (*Cushing and Faulkner* with him,) in support of the motion.

Lane, for plaintiffs.

DOE, C. J. [After discussing the constitutional provision for the separation of the legislative, executive and judicial powers.]

Nothing having been done by anybody by authority, or in pursuance of the acts of 1861 and 1866 (52 N. H. 390), the Cheshire Railroad Company is not benefited by those acts unless the act of 1861 operated, a year after its passage, as a foreclosure of the mortgage of the railway of the Ashuelot company. And an amendment or repeal of the Ashuelot charter being as plainly a legislative act as the grant of the charter, the question whether a foreclosure of the mortgage is an exercise of legislative power is not advanced by inquiring what amount of legislative power is retained by the statutory reservations of a right of amendment and repeal. If a foreclosure of the mortgage is not a legislative act, the reservations are immaterial, since, whatever legislative power was reserved, no power was reserved that is not legislative.

The Ashuelot charter is a statute. An amendment or repeal of it would be another statute. And the power of making the second is not constitutionally greater than the power of making the first. A statute of incorporation is a legislative grant, held by the federal court to be a contract and a creation of private rights, protected, in the absence of a reservation, by the contract clause of the federal constitution. But calling it a charter, a grant, or a contract, does not

make it anything more than an exercise of legislative power. A reservation of the right to amend and repeal it is an exercise of the same power,— a legislative retention not of judicial or executive but of legislative power, and not a creation of any power, legislative, judicial, executive, or extra-constitutional. It has the negative effect of preventing the statute of incorporation being exempted by the contract clause from the legislative power of amendment and repeal, and putting it on an equality with other statutes that are not contracts, and are subject to that power. By not giving it a superior position, the legislature leave it on that level of subjection.

The reserved power of amendment and repeal is not anything more than the legislature would have had without a reservation, if statutes of incorporation had been held to be possessed of the ordinary, amendable, and repealable quality of other statutes. With a reservation of that power, an act of incorporation, regarded as a grant, is an alterable and revocable grant, a gift or conveyance of something, a part or the whole of which the grantor can, without the grantee's consent, take back or destroy. If the Ashuelot charter had contained an unlimited reservation of the legislative power of amending and repealing the legislative grant, the state would have reserved, and the corporation by accepting the charter would have consented to the reservation of, the power of taking from the corporation by legislation nothing more than that which, by legislation, the state had granted to it. Its existence, derived from the state, could be terminated by the state. But its right of redemption, like the mortgagee's right of foreclosure, is a piece of private property that cannot be taken away by a revocation of the charter, because it was not given by the charter. Of that property there is no state grant to be rescinded. It could not be granted by the state, because the state had not created or owned it. If it had been granted by the state, there might have been a question that is not raised in this case.

The Ashuelot company holds its equity of redemption as trustee for the stockholders, as Elliot holds the right of foreclosure in trust for the bondholders. An amendment of the charter would not be an exercise of a higher constitutional power than would be employed in a repeal of the charter. And a repeal would not leave the equity of redemption in a worse plight than it would have been in if the same investment had been made, without a charter, in the name of some other trustee, and the trustee had died. The law cannot suffer a trust to fail for want of a trustee; for the beneficiaries have a private right in the trust estate, which is as inviolable as property similarly invested without a trustee. If, with the consent of the stockholders, the charter of a railroad corporation were repealed, its right of way abandoned, and its business discontinued, its real estate held in fee would not escheat, and its rolling-stock and cash would not pass to the state as wrecked goods or treasure-trove. The corporate property remaining in existence could not be confiscated by a legislative decree, and

the right of the stockholders to a distribution of the assets through the agency of a trustee or receiver, or other legal process, could not be denied without a repudiation of constitutional duty. The question whether the termination of this equity of redemption by foreclosure is a legislative act is not affected by the circumstance that the mortgagor is incorporated.

Railway corporations being common carriers, are engaged in a public service. They are public corporations so far as the protection of the public rights is concerned; and their ways, taken for public use, like other highways, are public. Gen. St., c. 146, ss. 1, 2, 3; *McDuffee v. P. & R. Railroad*, 52 N. H. 430, 448, 449, 454. If the public, at its own expense, buys a right of way and builds a road, as in the case of an ordinary town highway, it owns what it buys and pays for. But if, instead of making such an investment of its own money, it allows a turnpike company to take and pay for the right of way and build the road, the public is not the proprietor of the road, as it was not of the money which the company expended. Its right is a right of travel for a reasonable toll. Its right in a railway, owned not by itself but by an incorporated or unincorporated common carrier, is a right of reasonable transportation for a reasonable price. In this case, the mortgaged property being subject to a public use, its owner cannot withhold from the public the use to which it is entitled; but the equity of redemption being private property, the public power to divest the owner of it for the private benefit of the mortgagee cannot rest on the public right of reasonable transportation at a reasonable price. Over the corporation as a common carrier, and over its road as property devoted to a public use, the public power is sufficient for the maintenance of the public rights, but not for the extinction of the private title for a private purpose. It is no more an exercise of legislative power to decree a foreclosure of this mortgage of private property subject to the public right of transportation, than it is to decree a foreclosure against other private property.

It does not appear that there was any public interest to be promoted by a legislative foreclosure. And if there had been such an interest, it does not appear how the public character of that interest would have changed the legal nature of a foreclosure. If in the absence of such an interest a foreclosure would not be an act of a legislative character, it is not apparent how its public utility could give it that character. If the public were the mortgagee, and had every possible interest to deprive the mortgagor of the equity of redemption, that equity would still be private property; for the public would not mortgage its own property to itself. And the question would remain whether a foreclosure is a legislative act. And if the act of 1861 had declared itself to be not an adjudication of private rights, but a protection of the public interest and a regulation of the exercise of the public right of transportation, it would still have been necessary to go into the same inquiry.

The railway, including the right of redemption and the right of foreclosure, may be sold by the power of uniform taxation exercised for a public purpose, compensation being made to the owners in the common benefits of government. And a sale of it for taxes would exhibit the private character of the property. Compensation being made, it may be taken by eminent domain for public use. *Crosby v. Hanover*, 36 N. H. 404, 420; *W. R. Bridge Co. v. Dix*, 6 How. 507; *R. F. & P. R. Co. v. L. R. Co.*, 13 How. 71, 83; Cooley Const. Lim. 526. But the right of redemption was taken neither by the public nor for the public. The public right of using the road was the same before the foreclosure of 1861 as afterwards; and by the foreclosure, the exercise of that right was not regulated. The direct, legal, and practical effect of the act, if it were valid, would be to put an end to the right of the mortgagor, not for the public good, but for the private good of the mortgagee. The public might reap some indirect advantage from a foreclosure, turning the mortgage into an absolute deed. The public might derive a greater advantage from a decree removing the encumbrance, and making the mortgagor's title indefeasible. It might derive a still greater advantage from a decree giving the merged rights of the mortgagor and mortgagee to a third person. It might profit by the transfer of some shops, mills, and farms from their owners to others more thrifty, more enterprising, more generous, more patriotic, or less immoral. But the direct or indirect public interest in such a transfer is not the test of its legislative character.

Calling the legislative act of incorporation a grant, and the legislative act of amendment or repeal a modification or revocation of the grant, does not convey to the legislature a power that is not legislative, nor bestow the character of legislation upon an act not otherwise endowed with that character, nor authorize either branch of the government, or all the branches combined, to make a special decree extinguishing a certain mortgagor's private right of redeeming certain property, for the benefit of the mortgagee, or extinguishing the mortgagee's private right of foreclosure, for the benefit of the mortgagor, without consent, without compensation, without trial, and without notice. Such an act is not an exercise of the legislative, the judicial, or the executive power established by the constitution. It is an exercise of a power not tolerated by the constitution, because not compatible with the liberty the constitution was designed to secure. As neither of the branches of government can acquire, by its own act of reservation, any power exclusively vested by the constitution in either of the others, so neither can acquire, by its own act of reservation, that unlimited power which passed from the British parliament to the provisional government in 1776, and was abolished in 1784. The legislative effort to protect public interests against a contractual abdication of legislative power, by a reservation making a charter amendable and repealable like other statutes that are not contracts, does not

demolish the safeguards provided by the state constitution for private rights, does not unite powers which the constitution has separated, and does not revive the absolutism which the constitution extirpated nearly a hundred years ago.

A slight exercise of unconstitutional power by either department of the government is not less invalid than an extensive exercise of it. The question is not whether the act of 1861, if valid, would have been beneficial to the mortgagor, nor whether the foreclosure, decreed by that act, would, if valid, greatly vary from some other legal method. However slight the exercise of power compared with a repeal of the charter, however trifling the practical effect of it, and however insignificant the departure from other forms of procedure, the act of 1861, not being a legislative act, presents the difference between an unconstitutional foreclosure and a constitutional one.

The application to this case of an argument advanced by Webster, in an opinion given by him, in 1821, upon the validity of a Vermont statute granting a new trial in *Allen v. Hathaway & Pierson*, is decisive: "The standing laws of Vermont, proceeding on the principle that vested rights are not to be divested but by legal process and judicial proceeding, have authorized the supreme court of Vermont to grant new trials, for good cause shown, after judgment. In this very case, it was competent, and is now competent, for the supreme court to award a new trial. Now this must be the exercise either of a judicial or a legislative power. It cannot be both. If it is a power which may be constitutionally exercised by the legislature, for that reason it cannot be exercised by a judicial tribunal. Either therefore the general law of Vermont is unconstitutional, or this act is so." If the foreclosure of the Ashuelot mortgage is a legislative act, the general statute, directing in what court foreclosure suits shall be brought, is an attempt to authorize the court to make laws, and the judgments rendered in such suits, since 1784, are unconstitutional.

It may be doubtful whether some acts are legislative or judicial; but in this case there is no doubt. The foreclosure of the mortgage of private property, like the rendition of a judgment on a bond secured by the mortgage, is a judicial act. It requires notice and an opportunity for a trial of the questions of the existence and amount of the debt, and the existence, legality, and effect of the mortgage. The foreclosure of 1861 would have been invalid if the decree, made by the legislature, had been made by either of the other departments of the government. The extinguishment of the mortgagor's title by a special governmental decree, without consent, compensation, trial, or notice, is not an exercise of any constitutional power.

Motion denied.

SINKING-FUND CASE.

UNION PACIFIC R. CO. *v.* UNITED STATES.1878. 99 *U. S.* 700.¹

APPEAL from the Court of Claims.

The Union Pacific Railroad Company filed a petition in the Court of Claims against the United States, to recover one half the compensation for the transportation of U. S. troops. The defence was, that said half was retained by the Secretary of the U. S. Treasury, and used in the purchase of U. S. bonds for a sinking-fund, in accordance with the U. S. Act of May 7, 1878.

The Union Pacific R. Co. was chartered by Act of Congress, July 1, 1862. The Act provides that U. S. bonds shall be issued to the R. R. Co. as the various sections of the road are completed; that these bonds shall constitute a first mortgage on the road; that all compensation for services rendered by the R. R. Co. for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid; and that, until said bonds and interest are paid, at least five per centum of the net earnings of the road shall also be annually applied to the payment thereof.

July 2, 1864, before the construction of the road was begun, an Act was passed providing that only one half of the compensation for services rendered for the government should be required to be applied to the payment of the bonds issued by government in aid of the construction. This Act also provided that the R. R. Co. might issue its own first-mortgage bonds, and that the lien of the U. S. bonds should be subordinate to that of the bonds thus authorized to be issued by the R. R. Co.

The original Act of 1862, section 18, contains the following provision:—

“And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time—having due regard for the rights of said companies named herein—add to, alter, amend, or repeal this act.”

The Act of 1864, Section 22, provides, “that Congress may at any time alter, amend, or repeal this act.”

May 7, 1878, an Act was passed to amend the Acts of 1862 and 1864. The enacting clause is preceded by a lengthy preamble, or series of preambles, containing fifteen paragraphs, each beginning with “Whereas.” In this preamble it is stated (among other things)

¹ So much of the report as relates specially to the case of *Central Pacific R. Co. v. Gallatin* (heard at the same time), is omitted. The statement as to the case of the Union Pacific R. Co. is abridged; and only portions of the opinions are given.—Ed

that the United States have heretofore issued bonds as a loan to the R. R. Co., the principal sums of which amount to \$27,236,512; that the U. S. have paid over \$10,000,000 interest upon these bonds; that the corporation has issued an equal amount of its own bonds, which, if lawfully issued, constitute a prior lien; that the total liabilities of the R. R. Co. to all creditors (including the U. S.), amount to more than \$88,000,000; that the United States are not, and cannot, without further legislation, be, secure in their interests in and concerning said railroad; and that a due regard to the rights of the company, as well as just security to the United States in the premises, require that the previous Acts be altered and amended as hereinafter enacted.

Section 1, of the Act of 1878, provides how net earnings shall be ascertained.

By Section 2, the whole amount of compensation for services rendered for government shall be retained by the U. S.; one half thereof to be presently applied in liquidation of interest paid by U. S. upon bonds; the other half to be turned into a sinking-fund.

Section 3 provides, that there shall be established in the U. S. Treasury a sinking-fund, to be invested in U. S. bonds, and the semi-annual income thereof to be in like manner invested.

Section 4 provides, that the U. P. R. Co. shall annually pay into the U. S. Treasury, to the credit of the sinking-fund, the sum of \$850,000, or so much thereof as shall be necessary to make the five per cent net earnings and the whole earnings for government services, amount in the aggregate to twenty-five per cent of the whole net earnings for the preceding year.

Section 7 provides, that the sinking-fund shall at the maturity of the bonds issued by the U. S. be applied to the payment and satisfaction thereof.

Section 8 provides, that the sinking-fund shall be held for the protection, &c., of holders of mortgage debts of the R. R. Co. lawfully paramount to the rights of the U. S., and for the claims of other creditors lawfully chargeable upon the funds required to be paid into the sinking-fund, according to their respective lawful priorities, as well as for the U. S.

Section 9 provides, that all sums due to the U. S. from the R. R. Co., whether payable presently or not, and all sums required to be paid to the U. S. or to the sinking-fund, are hereby declared to be a lien upon all the property of the company, subject to any lawfully prior lien thereon. But this section shall not be construed to prevent the company from using and disposing of any of its property in the ordinary course of its current business, in good faith and for a valuable consideration.

Samuel Shellabarger and *Jeremiah M. Wilson*, for Union Pacific R. Co.

Charles Devens, Attorney General, and *Edwin B. Smith*, Assistant Attorney General, for the United States.

WAITE, C. J.

The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

The contract of the company in respect to the subsidy bonds is to pay both principal and interest when the principal matures, unless the debt is sooner discharged by the application of one-half the compensation for transportation and other services rendered for the government, and the five per cent of net earnings as specified in the charter. This was decided in *Union Pacific Railroad Co. v. United States*, 91 U. S. 72. The precise point to be determined now is, whether a statute which requires the company in the management of its affairs to set aside a portion of its current income as a sinking-fund to meet this and other mortgage debts when they mature, deprives the company of its property without due process of law, or in any other way improperly interferes with vested rights.

This corporation is a creature of the United States. It is a private corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control so far as its business affects the public interests. *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155.

It is unnecessary to decide what power Congress would have had over the charter if the right of amendment had not been reserved; for, as we think, that reservation has been made. In the act of 1862, sect. 18, it was accompanied by an explanatory statement showing that this had been done "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but especially in time of war) the use and benefits of the same for postal, military, and other purposes," and by an injunction that it should be used with "due

regard for the rights of said companies." In the act of 1864, however, there is nothing except the simple words (sect. 22) "that Congress may at any time alter, amend, and repeal this act." Taking both acts together, and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller v. The State* (15 Wall. 498), "it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;" and again, in *Holyoke Company v. Lyman* (id. 519), "to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation." Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup* (id. 459), he said, "the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State;" and again, as late as *Railroad Company v. Maine* (96 U. S. 510), "by the reservation . . . the State retained the power to alter it [the charter] in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities." Mr. Justice Swaine, in *Shields v. Ohio* (95 U. S. 324), says, by way of limitation, "The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." The rules as here laid down are fully sustained by authority. Further citations are unnecessary.

Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking-fund to meet it at maturity. Not having done so at first, it cannot now by

direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future.

Legislative control of the administration of the affairs of a corporation may, however, very properly include regulations by which suitable provision will be secured in advance for the payment of existing debts when they fall due. If a State under its reserved power of charter amendment were to provide that no dividends should be paid to stockholders from current earnings until some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was unconstitutional, either because it impaired the obligations of the charter contract or deprived the corporation of its property without due process of law. Take the case of an insurance company dividing its unearned premiums among its stockholders without laying by any thing to meet losses, would any one doubt the power of the State under its reserved right of amendment to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stockholders are entitled to receive all dividends that may legitimately be declared and paid out of the current net income, their claims on the property of the corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitimate uses, justice requires that they should in some way be restrained. A court of equity would do this, if called upon in an appropriate manner; and it needs no argument to show that a legislative regulation which requires no more of the corporation than a court would compel it to do without legislation is not unreasonable.

The company has been in the receipt of large earnings since the completion of its road, and, after paying the interest on its own bonds at maturity, has been dividing the remainder, or a very considerable portion of it, from time to time among its stockholders, without laying by anything to meet the enormous debt which, considering the amount, is so soon to become due.

Under these circumstances, the stockholders of to-day have no property right to dividends which shall absorb all the net earnings after paying debts already due. The current earnings belong to the corporation, and the stockholders, as such, have no right to them as against the just demands of creditors.

The United States occupy towards this corporation a twofold rela-

tion, — that of sovereign and that of creditor. *United States v. Union Pacific Railroad Co.*, 98 U. S. 569. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign or creditors, require the company to pay the other debts it owes before they mature. But out of regard to the rights of the subsequent lienholders and stockholders, it is not only their right, but their duty, as sovereign to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others. A legislative regulation which does no more than require them to submit to their just contribution towards the payment of a bonded debt cannot in any sense be said to deprive them of their property without due process of law.

The question still remains, whether the particular provision of this statute now under consideration comes within this rule. It establishes a sinking-fund for the payment of debts when they mature, but does not pay the debts. The original contracts of loan are not changed. They remain as they were before, and are only to be met at maturity. All that has been done is to make it the duty of the company to lay by a portion of its current net income to meet its debts when they do fall due. In this way the current stockholders are prevented to some extent from depleting the treasury for their own benefit, at the expense of those who are to come after them. This is no more for the benefit of the creditors than it is for the corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest of a faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

To our minds it is a matter of no consequence that the Secretary of the Treasury is made the sinking-fund agent and the treasury of the United States the depository, or that the investment is to be made in the public funds of the United States. This does not make the deposit a payment of the debt due the United States. The duty of the manager of every sinking-fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available. Certainly no objection can be made to the security of this investment. In fact, we do not understand that complaint is made in this particular. The objection is to the creation of the fund and not to the investment, if that investment is not in law a payment.

Neither is it a fatal objection that the half of the earnings for services rendered the government, which by the act of 1864 was to be paid to the companies, is put into this fund. The government is not released from the payment. While the money is retained, it is only that it may be put into the fund, which, although kept in the treasury, is owned by

the company. When the debts are paid, the securities into which the moneys have been converted that remain undisposed of must be handed over to the corporation. Under the circumstances, the retaining of the money in the treasury as part of the sinking-fund is in law a payment to the company.

Not to pursue this branch of the inquiry any further, it is sufficient now to say that we think the legislation complained of may be sustained on the ground that it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and the corporators. It takes nothing from the corporation or the stockholders which actually belongs to them. It oppresses no one, and inflicts no wrong. It simply gives further assurance of the continued solvency and prosperity of a corporation in which the public are so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securities.

The legislation is also warranted under the authority by way of amendment to change or modify the rights, privileges, and immunities granted by the charter. The right of the stockholders to a division of the earnings of the corporation is a privilege derived from the charter. When the charter and its amendments first became laws, and the work on the road was undertaken, it was by no means sure that the enterprise would prove a financial success. No statutory restraint was then put upon the power of declaring dividends. It was not certain that the stock would ever find a place on the list of marketable securities, or that there would be any bonds subsequent in lien to that of the United States which could need legislative or other protection. Hence, all this was left unprovided for in the charter and its amendments as originally granted, and the reservation of the power of amendment inserted so as to enable the government to accommodate its legislation to the requirements of the public and the corporation as they should be developed in the future. Now it is known that the stock of the company has found its way to the markets of the world; that large issues of bonds have been made beyond what was originally contemplated, and that the company has gone on for years dividing its earnings without any regard to its increasing debt, or to the protection of those whose rights may be endangered if this practice is permitted to continue. For this reason Congress has interfered, and, under its reserved power, limited the privilege of declaring dividends on current earnings, so as to confine the stockholders to what is left after suitable provision has been made for the protection of creditors and stockholders against the disastrous consequences of a constantly increasing debt. As this increase cannot be kept down by payment unless voluntarily made by the corporation, the next best thing has been done, that is to say, a fund safely invested, which increases as the debt increases, has been established and set apart to meet the debt when the time comes that payment can be required.

Judgment affirmed.

STRONG J. [dissenting].

The contracts of the government with the Union Pacific Railroad Company and with the Central Pacific, which the act of Congress of 1878 has in view, were not made by the act of 1862, the act chartering the former company, nor by the amending act of 1864. They were made after those acts had been accepted by the companies, and after their chartered rights had been completely acquired. There was no agreement of the companies to repay the loan of government bonds made to them, until the bonds were issued and delivered. The companies were under no obligation to accept the loan and assume the liability resulting from its acceptance. The contracts, therefore, are no part of the charter of the Union Pacific Company, and no part of the acts of 1862-or 1864. They are subsequent to those acts and independent of them. It is true Congress authorized the loan. It made the companies offers to lend upon certain conditions; and when those offers and conditions were subsequently accepted, the contracts of loan were made. Not until then. Before that time there was nothing but an unaccepted offer.

Now, what has been attempted by the act of May 7, 1878? That act was passed with sole reference to this contract, and all its provisions have in view the imposition of additional obligations upon the railroad company. It does not purport to be a repeal of the charter. Its leading purpose is to take control of the property of the debtor, and sequester it for the security of a debt, which, by the terms of the contract, is not due and payable for years to come.

It is true it does not make immediate application of the sums thus withheld and demanded to the extinguishment of the debt. It declares that they shall be applied to the payment of the debt and interest "at the maturity of the bonds." But this is a distinction without a difference, obviously made to evade what it was known could not lawfully be done. An immediate application might as well have been directed. It would probably be better for the debtor if the application were immediately made. The money is taken from the debtor, withdrawn entirely from the debtor's control and use, and put into the treasury of the creditor, and there left to the mere agreement of the creditor to apply it to payment. I apprehend no plain man of common sense will hesitate to conclude that this is exacting payment before the debt is due. If A. borrows from B. \$1,000, and gives his note therefor, payable at the expiration of five years, and at the end of one year the lender demands that there be placed in his hands by the debtor a sum of money to meet the note when it shall fall due, it will hardly be contended that would not be requiring payment before the debtor was bound to pay. And if such a demand could be enforced, it would be at the expense of the contract. What more is the present case? And

were it conceded the act of 1878 does not attempt to enforce the payment before the maturity of the debt, the concession would be of little worth, for it will not be questioned that it attempts to enforce giving additional security for payment beyond that stipulated for in the contract. That is no less a material alteration of the contract, a serious addition to it. The plain truth is, the assertion of such a power is claiming the right to disregard the contract entirely, and substitute for it a different one, without the consent of the debtor.

The right of a promisee to demand payment when the note falls due is a right of property; and equally so is the right of the promisor to hold, as against his promisee, the consideration for the promise until the time stipulated in the note for payment. The promisee has no right to enforce payment, or to enforce giving security for it, if none was promised in the contract. Such a right is no portion of his property, and it can be enforced only at the expense of a clear right of the promisor. On the other hand, the promisor has a right to exemption from liability to give such security. It is incident to his contract. Indeed, it may be said that whatever rights are created by contract, or held under it, if they relate to property, are themselves, in a very just sense, property, and as such are protected by the fifth amendment to the Constitution.

I notice another consideration which, to my mind, is not without weight. It may, I think, well be doubted whether the act of 1878 is even an attempted exercise of legislative power. A statute undertaking to take the property of A. and transfer it to B. is not legislation. It would not be a law. It would be a decree or sentence, the right to declare which, if it exists at all, is in the Judicial Department of the government. The act of Congress is little, if any, more. It does not purport to be a general law. It does not apply to all corporations or to all debtors of the government. It singles out two corporations, debtors of the government, by name, and prescribes for them as debtors new duties to their creditor. It thus attempts to perform the functions of a court. This, I cannot but think, is outside of legislative action and power.

I turn now to what has been most relied upon in support of the validity of the act. I refer to the clauses in the acts of 1862 and 1864, reserving the right to repeal, amend, or alter. There are two such, — one in the act of 1862, and one in that of 1864. That in the latter act is the broadest, and it is as follows: "Congress may at any time alter, amend, or repeal this act." The power thus reserved is one over the act itself, not over any thing that may have lawfully been done under the act, before its repeal or alteration. It is only by great confusion of things essentially distinct that this power can be construed as applicable to a contract made after the corporation came into existence. Besides, the act of 1878 does not attempt to repeal, or alter or

amend, the acts of 1862 and 1864. It changes no franchise granted by those acts, nor does it interfere with its exercise. It interferes only with the fruits of the franchise. The right to possess and enjoy the income of the company is not a franchise. It is an incident of the ownership of the company's property, though the property may be accumulated by the use of the franchise. Concede that Congress has power to regulate the tolls on the railroad, or in some other mode to restrict the use of the franchise, and thus lessen the income, yet the income, whether large or small when made, is the company's property, and, like other property, protected against being taken without due process of law. Or suppose the acts of 1862 and 1864 were repealed, and thus all the franchises granted by them were taken away, the property of the company would remain, and the income thereof, though greatly decreased, would be the property of the stockholders. Nobody denies that. Is the lesser greater than the whole? I repeat, therefore, the act of 1878 is no exercise of the reserved power to alter, amend, or repeal the acts of 1862 and 1864. It is no attempt to make any such repeal or amendment. It is at most an attempt to seize the fruits of the franchise after they shall have become the vested property of the corporations. It is an attempt to sequester the income of the property owned by them. As well might the government attempt to seize and put into its treasury the rents, issues, and profits of the lands granted to them by the third and fourth sections of the act of 1862, and call that an amendment of the act. There is no distinction to be made between the profits of the road and telegraph line and the rents of the lands. None has been attempted.

But if the act of 1878 could be considered an alteration or amendment of the acts of 1862 and 1864, the question would still remain, what was the extent of the power reserved by those acts. I mean the power to alter, amend, or repeal them. All the cases agree that such a reserved power is not without limits. I think its limits may be stated generally thus: It must be exercised, when exerted at all, so as to do no injustice to those to whom the franchise has been granted. Certainly the reservation cannot mean a right to take away the franchise, in whole or in part, and yet hold the grantee to the performance of the duties assumed, — the consideration given for the grant. Nor can it mean to continue in the legislative power which the legislature never possessed, and which it is constitutionally incapable of exercising.

If the acts of 1862 and 1864 were repealed, would not the contract of loan remain unaffected thereby? Can a legislature that offers a contract on certain terms change those terms after they have been accepted and after the contract has been perfected? Yet that is what the act of 1878 attempts to do. A principal who has authorized his agent to make a contract for him may revoke or restrict the agency before any contract is made, but he is bound by a contract made during the continuance of the agent's powers, if those powers were not

transgressed in making it. He cannot afterwards repudiate its terms or add to them. I see no essential difference between such a case and the present. I cannot confound an alteration of the acts of 1862 and 1864 with an alteration of a subsequent commercial contract authorized by those acts, and made between the United States and companies chartered by them. My conviction, therefore, is, that the act of 1878 cannot be defended as a legitimate exercise of the powers reserved to Congress.

I need not say it cannot rest upon what is generally denominated the visitatorial power of the government over its own corporations, though it is upon this power the opinion of the majority of the court largely relies. That power is applicable only to eleemosynary corporations, such as colleges, schools, and hospitals, and the visitation is always through the medium of courts of justice. It is judicial and not legislative. 2 Kent, Com., Lect. 23, sect. 4. To claim, therefore, that, by virtue of that power, a private business corporation can be compelled by legislative action to establish a sinking-fund for the payment of its debts, and deposit it in the treasury of its creditor, is totally inadmissible.

There are, undoubtedly, many cases to be found in which it has been decided that, by virtue of such a reservation as that contained in the acts of 1862 and 1864, a legislature may make new regulations, to some extent, of the action of corporations created by it, — such as prescribing a new measure of tolls, increasing the capital of insurance companies, repealing an exemption from taxation, and the like. So, without the reservations, some new regulations may be prescribed in the exercise of the police power. They are all regulations of the franchise or of its use, — not invasions of rights or property acquired under the franchise subsequently to its grant; and not one of them under the practice of amendment or rightful regulation has undertaken to change or vary any contract the corporation had made, or to control possession of property acquired. The act of 1878 is, I believe, the first assertion of any such force in the reservation. It is a very grave and dangerous assertion. It is especially dangerous in these days of attempted repudiation, when the good faith of the government is above all price. If it can be maintained, the government is no longer bound by any commercial contract into which it may enter with these corporations, though it holds them bound. I cannot assent to any such doctrine; and upon the whole, in my opinion, the act of 1878 is not only unauthorized by any power existing in Congress, but it is an infraction of the prohibition I have pointed out, contained in the fifth amendment of the Constitution.

BRADLEY, J. [dissenting].

The contract between the Union and Central Pacific Railroad Companies and the government was an executed contract, and a definite one. It was in effect this: that the government should loan the com-

panies certain moneys, and that the companies should have a certain period of time to repay the amount, the loan resting on the security of the companies' works. Congress, by the law in question, without any change of circumstances, and against the protest of the companies, declares that the money shall be paid at an earlier day, and that the contract shall be changed *pro tanto*. This is the substance and effect of the law. Calling the money paid a sinking-fund makes no substantial difference. The pretence or excuse for the law is that the stipulated security is not good. Congress takes up the question, *ex parte*, discusses and decides it, passes judgment, and proposes to issue execution, and to subject the companies to heavy penalties if they do not comply. That is the plain English of the law. In view of the limitations referred to, has Congress the power to do this? In my judgment it has not. The law virtually deprives the companies of their property without due process of law; takes it for public use without compensation; and operates as an exercise by Congress of the judicial power of the government.

It will not do to say that the violation of the contract by the law in question is not a taking of property. In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled. That it will be entitled by the contract to a like amount at some future time does not matter. Time is a part of the contract. To coerce a delivery of the money is to coerce without right a delivery of that which is not the property of the government, but the property of the companies. It is needless to refer to the importance to the companies of the time which the contract gives. If it be alleged that the security of the government requires this to be done in consequence of waste or dissipation by the companies of the mortgage security, that is a question to be decided by judicial investigation with opportunity of defence. A prejudgment of the question by the Legislative Department is a usurpation of the judicial power.

But if it were not, as it is, an actual or physical taking of property, — if it were merely the subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law.

Nor does the case in hand bear any analogy to what are familiarly known as the *Granger Cases*, reported in 94 U. S. under the names of *Munn v. Illinois*, &c. The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon

the citizen ; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power. It is obvious that the present case does not belong to that category. It is an individual case of private contract between the companies and the government. It is a question of dollars and cents, and terms and conditions, in a particular case. To call the law an exercise of the police power would be a misuse of terms.

Great stress, however, is laid upon the reservation in the charter of the right to amend, alter, or repeal the act.

As a matter of fact, the reservation referred to really has no office in an act of Congress ; for Congress is not subject, as the States are, to the inhibition against passing any law impairing the obligation of contracts. It has become so much the custom to insert it in all charters at the present day, that its original intent and purpose are sometimes forgotten. Since, however, it is contained in the charter of the Union Pacific Railroad Company, it is proper that its meaning and effect should be adverted to.

It seems to me that this clause has been greatly misunderstood. It is a sort of proviso peculiar to American legislation, growing out of the decision in the *Dartmouth College Case*.

In my judgment, the reservation is to be interpreted as placing the State legislature back on the same platform of power and control over the charter containing it as it would have occupied had the constitutional restriction about contracts never existed ; and I think the reservation effects nothing more. It certainly cannot be interpreted as reserving a right to violate a contract at will. No legislature ever reserved such a right in any contract. Legislatures often reserve the right to terminate a continuous contract at will ; but never to violate a contract, or change its terms without the consent of the other party. The reserved power in question is simply that of legislation, — to alter, amend, or repeal a charter. This is very different from the power to violate, or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles ; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable.

The question then comes back to the extent of the power to legislate. But that is a restricted power, — restricted by other constitutional provisions, to which reference has already been made. Certainly the legislature cannot in a charter of incorporation, or in any other law, reserve to itself any greater power of legislation than the Constitution itself concedes to it. It seems to me clear, therefore, that the power

reserved cannot authorize a flat abrogation of the contract by Congress, because, as before shown, such an abrogation would be a violation of those clauses which inhibit the taking of property without process of law and without compensation.

It may be said that by reason of the reserved power to alter and repeal a charter, this court has sustained legislative acts imposing taxes from which the corporation by the charter was exempted. This is true. But the imposition of taxes is preëminently an act of legislation. Its temporary suspension, conceded in a charter, is a suspension of the legislative power *pro tanto*. Being such, a reservation of the right to legislate, or, which is the same thing, to alter, amend, or repeal the charter, necessarily includes the right to resume the power of taxation. The same observations apply to the regulation of fares and freights; for this is a branch of the police power, applicable to all cases which involve a common charge upon the people.

I conclude, therefore, that the power reserved to alter, amend, and repeal the charter of the Union Pacific Railroad Company is not sufficient to authorize the passage of the law in question.

FIELD, J. [dissenting].

The decision will, in my opinion, tend to create insecurity in the title to corporate property in the country. It, in effect, determines that the general government, in its dealings with the Pacific Railroad Companies, is under no legal obligation to fulfil its contracts, and that whether it shall do so is a question of policy and not of duty. It also seems to me to recognize the right of the government to appropriate by legislative decree the earnings of those companies, without judicial inquiry and determination as to its claim to such earnings, thus sanctioning the exercise of judicial functions in its own cases.

It is not material, in the view I take of the subject, whether the deposit of this large sum in the treasury of the creditor be termed a payment, or something else. It is the exaction from the company of money for which the original contract did not stipulate, which constitutes the objectionable feature of the act of 1878. The act thus makes a great change in the liabilities of the company. Its purpose, however disguised, is to coerce the payment of money years in advance of the time prescribed by the contract. That such legislation is beyond the power of Congress I cannot entertain a doubt.

If the company was wasting its property, of which no allegation is made, or impairing the security of the government, the remedy by suit was ample. To declare that one of two contracting parties is entitled, under the contract between them, to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the

exercise of judicial power, — and all such power, with respect to any transaction arising under the laws of the United States, is vested by the Constitution in the courts of the country.

The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions. Thus an act of the legislature of Illinois authorizing the sale of the lands of an intestate, to raise a specific sum, to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred, was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts which could not be performed by the legislature. 3 Scam. 238.

HUNT, J., was absent.

CITY OF DETROIT v. DETROIT AND HOWELL PLANK ROAD CO.

1880. 43 Michigan, 140.¹

MANDAMUS.

F. A. Baker, E. F. Conely, and Otto Kirchner, Attorney General, for relator.

Chas. A. Kent, and G. V. N. Lothrop, for respondent.

COOLEY, J. A mandamus is applied for in this case to compel the respondent to remove beyond the city limits a toll-gate located on Grand River street. The questions the application presents are questions of statutory construction and of constitutional law.

The respondent was incorporated April 3, 1848, for the purpose of building and maintaining a plank road from the city of Detroit to the village of Howell, with certain specified branches. The third section of the act of incorporation provided that the corporation "shall be subject to the provisions of an act entitled 'An act relative to plank roads,' approved March 13, 1848, except so far as otherwise provided in this act." The fifth section was as follows: "This act shall be and remain

¹ Argument and part of opinion omitted. — ED.

in force for the term of sixty years from and after its passage; but the Legislature may at any time alter, amend or repeal this act by a vote of two thirds of each branch thereof; but such alteration, amendment or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the Legislature that there has been a violation by the company of some of the provisions of this act: *Provided*, That after said thirty years, no alteration or reduction of the tolls of said company shall be made during its existence unless the yearly net profits of said company, over and above all expenses, shall exceed ten per cent on the capital stock invested, provided there be no violation of the charter of said company." Laws 1848, p. 398.

This act of incorporation was one of a considerable number passed by the same Legislature, all very short, and doing little beyond fixing the line of the proposed road, and the period of corporate existence, but referring for all other directions to the "Act relative to plank roads," subject to the provisions of which they were all made. That act prescribed a method of organization, enumerated the corporate powers and franchises, provided for an annual report to the Secretary of State, prescribed rates of toll, and limited the imposition of taxes. Laws 1848, p. 59.

con In 1879 a further section was added to the general act of 1848 as follows: "No plank-road company organized subject to the provisions of this act, shall, without the consent of the local authorities, keep or maintain a toll-gate within the present or future corporate limits of any city, or village; and no such company shall collect toll for any portion of its road, within such limits, on which a pavement is maintained by such municipality. The assent of any such company to this amendment shall not be necessary in order to make this act applicable to such company. And if any plank-road company or companies in this State are, at the time of the passage of this act, maintaining any toll-gate within the present corporate limits of any city or village, said plank-road company or companies, are hereby required to discontinue and remove said toll-gate beyond the limits of said city or village, within sixty days after they are notified by the municipal authorities to so discontinue or remove the same." Public Laws 1879, p. 197.

It is upon this last amendment that the questions in this case arise. The toll-gate of the respondent on Grand River street is within the existing corporate limits of the city of Detroit, and the city authorities notified the respondent to discontinue and remove the same more than sixty days before this proceeding was instituted. The respondent denies the validity of the act of 1879, and refuses to conform to it. It is admitted that but for the act of 1879 respondent might lawfully maintain the gate where it is, the city having been extended to embrace it since the gate was located. *Chope v. Detroit & Howell P. R. Co.* 37 Mich. 195.

The effect of this legislation, if valid, would be to take from respondent

ent about two miles and a half of the road upon which it now collects toll. It is not pretended that this is done by reason of any forfeiture done or suffered by the respondent, and if it were, a judicial finding would be necessary. *Flint etc. Plank-Road Co. v. Woodhull* 25 Mich. 99. Nor is it claimed that the act of 1879 was passed as a regulation of police. It would probably be conceded that it goes quite beyond the competency of an act of mere regulation, and that it must be sustained, if at all, as an act passed in the exercise of that complete power to amend and repeal, which was reserved in passing both the general act of 1848 and the charter of respondent. The city relies upon it as an exercise of that power, and not otherwise.

[After discussing the question whether the act of 1879 is invalid on account of its inconsistency with an act passed in 1853.]

But leaving out of view the act of 1853, is the act of 1879 a legitimate exercise of the power to amend the plank-road charters? It has been seen that in the case of this particular company it takes from it about two miles and a half of its road, and this may be and probably is from the most profitable portion of it. That this diminishes essentially the value of the road is not to be doubted, though the extent is immaterial.

There are cases in which amendments to charters having some resemblance to this have been sustained, but it is in general easy to distinguish them. Many of these are cited in the brief for the relator. *Commissioners v. Holyoke Co.* 104 Mass. 446, in which a company having a dam across the Connecticut river was required to construct a fish-way, was a case involving a mere police regulation for the preservation of rights of others in the fishery above and below. All the following cases involved the same principle: *Commonwealth v. Eastern R. R. Co.* 103 Mass. 254, where a railroad company was required to build a station house and stop its trains at a certain locality; *Albany etc. R. R. Co. v. Brownell* 24 N. Y. 345, in which it was held competent to require a railroad company to permit and provide for the crossing of its tract by highways; *Roxbury v. Boston R. R. Co.* 6 Cush. 424, in which a like question was involved; *English v. New Haven etc. Co.* 32 Conn. 240, in which a bridge, made necessary for the convenience of a railroad company, and used by the company and the public, was required to be made wider by the company; *Worcester v. Norwich etc. R. R. Co.* 109 Mass. 103, in which the railroads coming into a city were required to unite in a common passenger station at a point to be determined by commissioners; *Meadow Dam Co. v. Gray* 30 Me. 547, in which a company incorporated to build a dam across a river was required to construct a lock for purposes of navigation; and there are many others of the same sort. Cases involving only the right to change the methods or the extent of taxation, may be dismissed altogether from consideration, as this right must always exist when there is no express contract to the contrary. *East Saginaw Salt Manfg. Co. v. East Saginaw* 13 Wall. 373. So may cases in-

volved only the question of the liability of corporations to the control of the general police laws of the State. *Beer Company v. Massachusetts* 97 U. S. 25; *Fertilizing Company v. Hyde Park* id. 659.

But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany etc. R. R. Co. v. Brownell* 24 N. Y. 345 is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes, to the same burden except in connection with provision for compensation. The decision was in accord with that in *Commonwealth v. Essex Co.* 13 Gray 239, 253, in which, while the power to alter, amend or repeal the corporate franchises was sustained, it was at the same time declared that "no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." The same doctrine is clearly asserted and affirmed in *Railroad Company v. Muine* 96 U. S. 499, and is assumed to be unquestionable in the several opinions delivered in the *Sinking Fund Cases*, 99 U. S. 700.

But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary vocations of life, by gift or descent, or by making profitable use of a franchise granted by the State: it is enough that it has become private property, and it is then protected by the "law of the land." Even municipal corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it. *Terrett v. Taylor* 9 Cr. 43; *Pawlet v. Clark* 9 Cr. 292; *State v. Haben* 22 Wis. 660; *People v. Common Council* 28 Mich. 228.

We have said nothing of those cases in which charters have been amended by limiting the tolls that may be taken, as it is conceded by

relator that that is not what has been attempted in this case. It was a part of the original contract that the tolls should not be reduced by the State until the annual returns should realize to the stockholders ten per centum annually on their investment, and it is not claimed that that limit has been reached. What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation.

It may be that what the Legislature of 1879 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences. But even such inconveniences must be trivial, since the power to appropriate private property to public uses is always ample and always at command.

It results, from what has above been said, that the mandamus must be denied.

The other justices concurred.

DOW v. NORTHERN RAILROAD.

1887. 67 *New Hampshire*, 1.¹

BILL IN EQUITY, by Samuel H. Dow and John E. Robertson, stockholders in the Northern Railroad, against the Northern Railroad, the Boston & Lowell Railroad, and the directors of the Northern Railroad, seeking to enjoin the operation of the Northern Railroad by the Boston & Lowell Railroad under a contract of lease.

Answers were filed, and the case was heard at the trial term before CARPENTER, J., both parties introducing evidence. Facts were found by the court, and the case was reserved for the law term by request of parties.

Only so much of the facts are here given as are material to the points upon which the case was decided.

¹ The greater part of the opinion is omitted. — Ed.

The Northern Railroad was chartered in 1844. The corporation was authorized to construct and keep in use a railroad from Concord to Lebanon. Section 11 provides that "the legislature may alter, amend, or modify the provisions of this act, or repeal the same, notice being given to the corporation, and an opportunity to be heard." The road was constructed and put in operation within a few years after the charter. Chapter 100, Laws of 1883, enacts that (subject to certain conditions and qualifications) "Any railroad corporation may lease its road, railroad property, and interests to any other railroad corporation," upon such terms and for such time as may be approved by a two-thirds vote of the stockholders of each corporation (section 17). This act contains no provision for the compensation of dissenting stockholders. It was assumed that the Northern Railroad had notice of the proposed passage of this statute. On June 18, 1884, the stockholders of the Northern Railroad, by a vote of more than two thirds, approved a lease to the Boston & Lowell. On the same day, pursuant to this vote, the Northern Railroad, by its president, executed to the Boston & Lowell Railroad a lease for ninety-nine years, of the railroad, rolling-stock, etc., of the lessor, the lessee to pay a specified quarterly rental, and perform various other covenants. The plaintiffs voted against approving the lease, and seasonably filed their bill in equity, praying that the Boston & Lowell Railroad be enjoined from operating the Northern Railroad under the lease, and that the Northern Railroad and its directors be ordered to assume the management of the road.

Bingham & Mitchell and *Jeremiah Smith*, for the plaintiffs.

Josiah H. Benton, Jr. (of Massachusetts), and *William L. Foster*, for the Northern Railroad.

William S. Ladd, *Charles H. Burns*, *Daniel Barnard*, and *A. A. Strout* (of Maine), for the Boston & Lowell Railroad.

[Decree for plaintiffs; *DOE C. J.*, *SMITH J.*, and *CLARK J.*, concurring. *ALLEN J.*, dissented. *BLODGETT J.*, *CARPENTER J.*, and *BINGHAM J.*, did not sit. Subsequently to the entry of the decree, *DOE C. J.*, prepared a written opinion. The learned Judge *held*, that the making of the lease was beyond the power of the majority. He then entered into an elaborate examination of the Dartmouth College Case; believing that a full understanding of that case is necessary to explain the history, and to determine the real scope and effect, of the customary clause reserving to the legislature power to alter, amend or repeal corporate charters. His view, as to the Dartmouth College Case, was that both courts were wrong; that the State court erred in holding that the acts of 1816 were not in violation of the State constitution; and that the federal court erred in holding that the federal constitution prohibited a repeal of the charter. He was of opinion that a corporate charter is not a contract within the meaning of the federal constitution, and hence is revocable even though no power of repeal be expressly reserved. After thus discussing the Dartmouth College Case, the learned Judge proceeded to consider the effect of the clause in the

charter providing that the legislature may alter, amend, modify or repeal the provisions of the act. From this part of the opinion, the following extracts are made.]

DOE C. J.

The Northern charter, considered as an agreement in which, by federal construction, the state is one of two contracting parties, is like any private contract made by A and B, which A reserves a right to alter or rescind without B's consent. The reservation enables A to alter his own agreement by partial or total rescission. It does not make him the owner of B's property, nor enable him to take it or control it, or to acquire, over B's life, liberty, or property, any power, limited or unlimited, legislative or non-legislative, by altering B's agreement, and thereby making an agreement for B, and uniting in himself the contractual functions of both parties. If A rescinds a part, B can rescind the rest. A's right to alter his own agreement by rescinding a part of it, is not greater than his right to rescind the whole. He may exercise his reserved right conditionally or unconditionally. He may make his rescission dependent upon B's refusing to make a new agreement by altering the old one. There may be many reserved options as to the manner of performing the original promise of each party; but no legal construction can destroy all or any of B's legal rights by giving A an irrevocable authority to bind B by whatever bargain A chooses to make with himself. While the state is the only assenting party necessary for making, altering, or repealing a charter law, it is not the only party necessary for making a contract either by entering into an entirely new agreement, or by assenting to an alteration of an old one.

"The legislature may amend or repeal the law and the contract of this charter, and they hereby acquire absolute dominion over the grantees, and a right to exercise against them the non-legislative power vested in the imperial parliament of Great Britain, and in every other purely despotic government." Such a reservation in the Northern charter would be inoperative beyond the retention of legislative power.¹ It would not abolish the distinction between the charter law and the charter contract, and would not dispense with the necessity of two assenting parties in a contract. The construction which makes the usual reservation a legislative acquisition of non-legislative power, sets up arbitrary personal will in place of a government of laws. The claim that judges can veto a charter amendment or governmental surrender which seems to them unreasonable (*Sinking Fund Cases*, 99 U. S. 700, 726; *Butchers' Co. v. Crescent City Co.*, 111 U. S. 746, 750,

¹ Among Judge Doe's memoranda, apparently intended to be used in revising his opinion, are found the following sentences:

"Suppose the legislature reserve power to deprive the stockholders of life and liberty, as well as property, at their discretion."

"There must be a limit to the legal power of individuals to deprive themselves, by contract, of their constitutional rights of life, liberty, and property."

751) suggests no limiting law, but another lawless will, concurring or non-concurring on the question of what is reasonable, expedient, or necessary, as a matter of fact. "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U. S. 356, 369. Federal decisions based on degrees of reasonableness, policy, or necessity, found by the court as matters of fact in the amendment of charters and the contractual surrender of law-making power, being in conflict with the law of this state, are not followed here, except so far as their authority is paramount on federal questions. The present case is decided upon the local law.

The extension of the Old Colony Railroad from Fall River in Massachusetts to Newport in Rhode Island, authorized by the legislature and a majority of the stockholders, was held to be legal because the business to be done in Rhode Island was of the same kind as that done in Massachusetts. *Durfee v. Railroad*, 5 Allen, 230. The company would be a railway common carrier in both states. The court suggest that a limit of the legislative power of amending the charter, even with the consent of the corporation, might perhaps be found in the doctrine that the corporate powers cannot be extended to enterprises or operations different in their nature and kind from those comprehended in the original charter (*p.* 247). As each stockholder, by taking a share under an alterable charter, assented to an exercise of the entire legislative power of alteration, the doctrine of the *Old Colony Case* is, that he assented to an amendment authorizing the company to extend their road by connecting it with and becoming lessees of all similar roads, and taking assignments of all human business "of a nature similar to" that "embraced within the original grant of power." After the company had exhausted its power of expansion within the limit of similarity, this doctrine of the enlargement of one kind of business, if sound, would not sustain a legislative amendment authorizing the company to transfer all its possessions by a lease under which the lessee would take the place of the lessor in the lessor's common carrier business. As that would be all the business of that kind in the world, the subsequent business of the lessor would be of a different kind. A leasehold extension of the Old Colony, leaving that company for a short time in the business of a common carrier on its original track between Boston and Fall River, followed by its transfer of that track to a lessee for ninety-nine years, would illustrate the difference between taking a lease and giving one. A legislative power of authorizing a majority of the stockholders to make leases as well as accept them, would be based on the theory that each subscriber, by taking a share of stock and paying one hundred dollars to be used in building and operating a railroad from Boston to Fall River, agreed not only that he might be embarked in

the operation of that and all other railroads, but also that he might be thrown out of the carrier business of the road he helped to build, and exposed to the risks of all the railway investments of mankind except the one for which he subscribed.

[After citing *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383, 385, 386.]

"That case," says *Selden*, J., in *Buffalo, etc., Railroad Co. v. Dudley*, 14 N. Y. 336, 355, "is in direct conflict with several English cases." Parliament having authority to make any person a member of any incorporated or unincorporated partnership without his consent, and to make any alteration in his helpless condition, and the question in English courts being merely whether parliament intended to exercise this non-legislative power, the decisions of that question are inadvertently cited in a manner that tends to throw doubt upon all constitutional security of private rights, and to countenance the idea that the people of New York are living under a government as absolute as the one they cast off when they ceased to be subjects of Great Britain.

Cases in which a construction is given to the exercise of the unlimited power of parliament, without occasion to consider the legal nature of legislative power, and without regard to the question whether the absolute sovereignty exercised in a particular instance is legislative, judicial, or executive, or neither, have a tendency, so far as they are followed in this country, to obliterate an essential feature of American government, and to reestablish the arbitrary dominion that was extinguished in this state by the constitution. *Hammersmith & City Railway Co. v. Brand*, L. R. 4 H. L. 171, 196. The argument from British precedent begs the question of legislative authority, and takes it for granted that the people of New Hampshire, who went through the Revolution for rights of life, liberty, and property which they considered natural, essential, and inherent (Bill of Rights, art. 2), proceeded deliberately, at the close of the struggle, to set up a government as despotic as the one they overturned. The argument proves too much. If it had any force it would show that the members of the senate and house, by amending wills, conveyances, and laws, can transfer to themselves all property, public and private, that is subject to their legislative control.

The usage of the American colonies and states before the adoption of constitutional limitations has been a misleading precedent. In *Rice v. Parkman*, 16 Mass. 326, decided in 1820, a legislative resolve, passed in 1792, had authorized A to sell and convey the real estate of B and C. Of this resolve the court said,—"It is not legislation, which must be by general acts and rules, but the use of a parental or tutorial power for purposes of kindness." "The only object of the authority granted by the legislature was to transmute real into personal estate for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this state since the

adoption of the constitution, and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British parliament, on similar subjects, time out of mind." Under the non-legislative reign of parliament, and the pre-constitutional government of this state, there was no limit of governmental power to be decided or considered by the court. The acts of banishment and confiscation, passed and enforced by the provisional government of the Revolution (Acts of Nov. 19 and 28, 1778, Belk. Hist. N. H., c. 26), were as valid as the *Habeas Corpus* act. *Atherton v. Johnson*, 2 N. H. 31, 34; *Thompson v. Carr*, 5 N. H. 510; *Gould v. Raymond*, 59 N. H. 260, 272-275; *Jackson v. Stokes*, 3 Johns. 151. If, upon true construction, not modified by usage, the Massachusetts legislature of 1792 could authorize A to make the conveyance that was upheld in *Rice v. Parkman*, they could make the conveyance without delegating their authority, could sell A's property without his consent, or authorize B and C to sell it, and can act as guardian and absolute sovereign in all cases in which they choose not to employ agents, in their unlimited control of property and its owners. And if, in addition to the powers of eminent domain, taxation, and police, the senate and house have a general power of conveying what the state does not own, they can lease any railroad on any terms to whom they please and dispose of any private property as they see fit, can transfer all real and personal estate to one man, or make an annual distribution of it, or enact a universal community of interest in it, and leave it, in common and undivided, to be used by the strongest. On the question of power, English precedent and the pre-constitutional practice of this country establish either boundless despotism or nothing.

In Massachusetts as well as in New Hampshire the law-making branch of government did not wholly abstain from non-legislative acts after the adoption of the legislative limitation. In this state the senate and house continued to grant new trials until 1817. *Merrill v. Sherburne*, 1 N. H. 199. The same practice, continued in Massachusetts after the adoption of the state constitution, is now held to be illegal. Quincy Mass. Reports, 473, n. 17. But the continued exercise of the non-legislative and unlimited power of parliament and the pre-constitutional government of Massachusetts, in the conveyance of property not belonging to the state, was held legal in *Rice v. Parkman*, which has become a leading case. Cool. Const. Lim. 97-106. The contrary doctrine has been settled here sixty years. 4 N. H. 572-574. If the property of incorporated or unincorporated partners can be leased for ninety-nine years without the owners' consent, it can be sold without their consent. In Massachusetts and other states, the legislative power of selling private property for the owners' benefit is a survival of the consolidated form of government that enabled parliament and the colonial assemblies to disregard the difference between making law and administering it. When one sale of such property is ordered by a judicial decree (*Old South v. Crocker*, 119 Mass. 1, 26, 27, *Bam-*

forth v. Bamforth, 123 Mass. 280; *Petition of Baptist Church*, 51 N. H. 424; *Methodist Episcopal Society v. Harriman*, 54 N. H. 444, 446; Gray Perp., s. 590, n. 3), and another sale of the same kind and for the same purpose is ordered by a vote of the senate and house, either the court legislate, or the legislature exercise judicial power. There is usurpation on one side or the other.

If a reservation of the power of amending a general or special act of incorporation is a creation, and a conveyance to the legislature of a non-legislative power of altering a partnership contract authorized by the same act, the senate and house, by reservation, can create and acquire the non-legislative power of altering all agreements. "All future contracts, not made under and in accordance with this act, are prohibited. The power of making a contract under this act is granted to those only who accept and exercise the granted power with and upon the condition that the contract may be amended by a power hereby reserved and hereby vested in the legislature. This act shall be a part of every contract; and every stipulation excluding it, and every device for evading it, shall be illegal and void. All law inconsistent with this act is hereby repealed." Such an act in amendment of the law of contracts would assume, not that partnership and all other private contracts are laws of the land, makable and alterable only by law-makers, but that they are not laws, and can be made and altered by persons who are not legislators, and that the non-legislative power of altering them can be reserved by the senate and house, and added to the law-making power of those assemblies. The power thus reserved would be appropriately exercised by such acts as these: "A's written agreement to pay B \$10, ten months after date, without security (or with such security only as a court can give by preventing the debtor's diversion of his property from the payment of the debt before it is due, when the threatened and wrongful diversion is found upon a judicial trial), is hereby amended: the debtor shall give security by paying \$1 a month to the trustee of a sinking fund of which the creditor is hereby appointed trustee; but if the debtor chooses to avoid the risks of the sinking trust, he may pay \$1 a month to the creditor as creditor." "B's indebtedness to A, secured by mortgage, is hereby amended: the mortgage is discharged." "C's agreement to pay D \$10 is hereby amended: the debtor shall pay \$100." "The partnership agreement of E, F, and G to run a daily coach between Concord and Lebanon is hereby amended: a majority of them may assign all the partnership business to H by a lease of all the partnership property for ninety-nine years." Each of these amendments would be enacted to overcome an objection, made by one of the contracting parties, to an alteration of his agreement. The amendments would not be valid unless they were law. If they would be law, they could not be made by the contracting parties, and the original contracts and all other agreements not made by law-makers would be void.

In the supposed case of A's unsecured indebtedness, a legislative

amendment requiring him, without due process of law, to give such security as his creditor could obtain for due cause shown in a judicial proceeding, would assume that any judgment which one branch of the government can render after trial, another branch can render without a trial; that each branch can do whatever can be done by either of the others; and that their prohibited union (*Ashuelot Railroad Co. v. Elliot*, 58 N. H. 451-453) has been effected in a triple form. If the state happened to be the creditor, this amendment would be both a commission issued by the creditor appointing himself judge of his own case, and a judgment rendered by him for the enforcement, not of his legal rights legally ascertained, but of his view of them. A reserved power of amendment that could thus alter a contract of the state, could confer upon any creditor the right of rendering summary judgment against his debtor without trial, and could authorize any debtor to enforce his view of his rights in the same manner.

The supposed amendment of the partnership contract, accompanied by a statutory regulation of the powers of partners under all partnership contracts subsequently made, would mark the distinction between the legislative character of an act that is general and prospective, and the non-legislative character of one that is special and retrospective. One is an effort to make a contract for E, F, and G by altering their agreement, and to bind them by a partnership contract they have not made: the other requires no one to be a partner.

All rights of property are not contractual; and there are other rights besides those of property: but persons of contractual capacity, who are under the necessity of making any purchase, sale, or other agreement, have no rights that cannot be taken from them by statute, if the senate and house can reserve the non-legislative power of amending contracts. An act providing that "All rights of property, liberty, and life of every person hereafter making any agreement may be amended by the legislature," would complete the restoration of despotism. Governments established by agreement can be changed or abolished by agreement: but the government which the legislative, judicial, and executive servants of the state are sworn officially to support, is the limited one established in 1784, and not the unlimited one that was then abolished. *Gould v. Raymond*, 59 N. H. 260, 272-275.

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EXTRACT FROM THE OPINION OF THE JUSTICES IN
ANSWER TO QUESTIONS PROPOSED BY THE HOUSE
OF REPRESENTATIVES IN 1891.

66 *New Hampshire*, p. 641 to p. 643.

As confiscation is a matter of substance and effect, and not of form or method, the mode of accomplishing it is as immaterial as any name that may be given it. Not being a legislative act in a constitutional sense, it is equally ineffectual whether attempted by a repeal or amendment of general or special acts of incorporation (G. L., c. 152), or by the repeal or amendment of the common or statutory law authorizing the organization of voluntary associations, religious societies, and partnerships (G. L., cc. 117, 118, 151, 153), or by the repeal or amendment of the common law or statutes regulating the business of any or all unincorporated persons, and the conveyance, inheritance, and use of their homesteads, tools, and stock in trade. All effective statutes are amendments. A statute amending the Concord charter can be nothing but an alteration of some law, either unwritten, or written in the charter or elsewhere. If a legislative power of amendment were a power of confiscation, it could be exercised as well by an alteration of some other law as by an alteration of a charter, and as well against unincorporated as against incorporated persons.

The argument for confiscation by amendment assumes that by the clause which the Dartmouth decision made necessary for the retention of the legislative power of altering the Concord charter, the senate and house altered the constitution, and created and acquired a power that is not legislative. The charter is a statute which the grant of legislative power in the second article of the state constitution authorizes them to amend. Reserving the power of amendment is merely not parting with it. The retention of power that can exist only within constitutional limits is not an expansion of those limits. The eighteenth section of the charter could have been written in this form: The legislative power of amendment, vested by the constitution in the senate and house, is hereby retained by them, and is hereby extended beyond the constitutional province of legislation, and enlarged into a power of confiscation.—Such an extension clause cannot be implied. If it were implied, it would be no stronger than if it were expressed. If it were expressed, it would be void. The act of keeping the amending power does not add a word to the constitution, nor take a word from it, nor change the meaning given to “legislative power” by the bill of rights. It neutralizes the federal decision, that a charter is a contract protected by the federal constitution against impairment by state law. The entire effect of the reservation is to leave this charter unaffected by that federal construction of the federal constitution. It releases the senate and house from the restraint which that construction put upon their law-making capacity. Thus liberated, they can amend the charter

by legislation, as they could have amended it without the reservation if the federal constitution had not been adopted, or the federal court had held that an act of mere incorporation is not a contract.

The questions proposed by the house are to be answered as they would have been at an earlier day, when the reservation was not necessary for an exercise of the legislative power of altering the law written in the charter. The question of confiscation by amendment is simplified, and cleared of irrelevant matter, by considering it as of the period between 1784 (when the constitution of New Hampshire took effect) and the subsequent adoption of the constitution of the United States. In July, 1784, the legislature could pass an act of eminent domain under which the owners of land in the Merrimack valley, between Concord and Massachusetts, could be compelled to sell to John Stark a right of way for a railroad, to be operated by him, as an unincorporated common carrier, using any kind of motive power. *Moore v. Veazie*, 32 Me. 343, 355; *Hull v. Railroad*, 21 Monthly Law Rep. 138, 141; *Ash v. Cummings*, 50 N. H. 591, 613, 614. He could institute legal proceedings for taking the right of way, and when he paid the land-owners the judicially ascertained amount of their damages, he could lawfully build and work the Concord road. The property which he bought and paid for would be his; the right to be carried by him on the road for a reasonable price would be public. If he had built the road in 1785, and the legislature had enacted in 1786 that his railroad and his farm should become the property of the state when the state paid him nine tenths or one tenth of their value, the confiscation of one tenth or nine tenths of either piece of property under that act in 1786 would have been a wrong against which he would have had no federal protection. *Owings v. Speed*, 5 Wheat. 420. There was no federal court in which he could resist it, and no federal ground on which it could be held illegal in this court. As it would have been an attempt to destroy rights of property and equality secured by the New Hampshire bill of rights, it would not have been an exercise of legislative power.

If the supposed statute of 1784 had been a corporate charter as well as an act of eminent domain, and Stark had accepted it and become a corporation, his right of property in his road would have been as inviolable as if he were not incorporated. Had the legislature reserved the power of amendment and repeal, his case would not have been altered. In 1786 the reservation would have been inoperative and useless. Without the reservation, the senate and house could repeal his charter, or amend it to any extent within the bounds of legislation. Neither without the reservation, nor with it, would his road be more liable to total or partial confiscation than his farm. The subsequent adoption of the federal constitution, its prohibition of state laws impairing the obligation of contracts, the federal decision that a charter is a contract protected by that prohibition, and the avoidance of that decision by reservations of the power of charter amendment and charter repeal, did not add a power of confiscation to the legislative power of 1784.

OHIO EX REL. v. NEFF.

1895. 52 *Ohio State*, 375.¹

ERROR to the Circuit Court of Hamilton County.

Proceedings in *quo warranto*, at the relation of the directors of the Cincinnati University, to oust the defendants from the positions heretofore held by them, of trustees of the Cincinnati College.

Cincinnati College was incorporated by the Act of January 22, 1819; the object of the incorporation being declared to be "the erection and maintenance of a college." By Section 8, "This act shall be subject to such alterations as the general assembly may from time to time see proper to make." The charter provides that the funds of the college shall consist of five thousand shares of twenty-five dollars each; and that the affairs of the college shall be under the management of a board of trustees, to be elected annually by the shareholders. By Section 7, the trustees of the college were authorized to exercise all the powers granted by a previous act of incorporation to the directors of the Cincinnati Lancaster Seminary; and were also authorized to apply the surplus funds of said seminary to the use of the college. The college received about \$10,000 from the seminary property, and about \$40,000 from subscriptions to its own shares; and later, in 1835, about \$4,000 more from additional subscriptions to shares. Various sources of instruction were from time to time attempted; but were all abandoned except a law school, which has been continuously and successfully maintained for more than fifty years.

In 1892 the general assembly passed an Act to amend the Act of 1819, incorporating the Cincinnati College. A portion of the amendatory Act is as follows:

"Whereas, the endowment of The Cincinnati College as at present invested and managed, is not sufficient to enable it to carry out the purposes of its charter; and,

"Whereas, in the opinion of the general assembly, it would be advantageous to The Cincinnati College and to the University of Cincinnati, and to the public generally, that the government of the two institutions should be joined and consolidated; therefore,

"SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That sections 3, 4, and 5, of the act entitled 'An act to incorporate The Cincinnati College,' passed the 22d day of January, A. D., 1819, be amended so as to read as follows:

"SEC. 3. The affairs of the said Cincinnati College shall hereafter be under the management of the directors, for the time being, of the University of Cincinnati, which directors shall be, and they are hereby constituted the board of trustees of The Cincinnati College, and they

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

are hereby authorized to exercise all the powers granted by law to the board of trustees of The Cincinnati College.

"SEC. 4. Be it further enacted, that the management of the funds, and of other matters belonging to or connected with the said Cincinnati College, shall be solely in the hands of the board of trustees aforesaid, and the said funds shall be administered for the purpose of carrying out the objects of the charter of The Cincinnati College, in connection with the funds and administration of the University of Cincinnati."

"SEC. 2. Be it further enacted, that sections 3, 4, and 5 of the said act of January 22, 1819, entitled 'An act to incorporate The Cincinnati College,' be, and the same are hereby repealed."

The Circuit Court dismissed the petition, whereupon the relators brought the record to this court to be reviewed on error.

J. B. Foraker, Wilby & Wald, and Matthews & Cleveland, for plaintiffs in error.

E. W. Kittredge, John F. Follett, and J. W. Warrington, for defendants in error.

BRADBURY, J. [After stating the case.] The constitutionality of this statute is assailed on a number of grounds, one of which is that it violates that provision of the nineteenth section of article I of the constitution of Ohio, which asserts that "Private property shall ever be held inviolate."

Whether the statute is obnoxious to that constitutional provision depends, 1, whether it violates the property rights of The Cincinnati College, and 2, if it does so, whether that corporation is entitled to the protection secured by the clause of the constitution of this state, above quoted.

[The learned Judge answered both the foregoing questions in the affirmative; giving reasons substantially similar to those of MARSHALL, C. J., in the Dartmouth College Case. The opinion then proceeds.]

We now come to the consideration of the provision in the charter of The Cincinnati College, which reserves to the general assembly the right of amendment. This reservation would be wholly unnecessary if The Cincinnati College had no rights of property which the general assembly was bound to respect. If the legislature, at its will could divest this corporation of its property, the legislative control of the institution would be absolute, for by taking away its entire property rights, all effectual corporate action would be at once paralyzed. Thenceforward it would be powerless to advance the purposes of its creation.

The authorities agree in holding that the legislative power of amendment and alteration thus reserved in charters, is not absolute, although its boundaries are not yet established. In Kentucky this power of amendment seems to be limited to those matters which concern the relations established by the charter between the corporation and the state.

“The power to alter or amend the contract, in our conception, is to change it *as between the original parties, and such others only, as have been permitted, by their mutual consent, to come into the enjoyment of its benefits and privileges*; not to compel one of the parties to operate in conjunction with others, and share with them the privileges and benefits of the contract.” *Sage v. Dillard*, 15 B. Monroe, 359.

Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it, the legislature can strip a corporation of its rights of property.

“The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, *the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases.*” *Shield v. Ohio*, 95 U. S. 324; *Detroit v. Plank Road Co.*, 43 Mich., 140; *Orr v. Bracken Co.*, 81 Ky. Rep. 593.

The Cincinnati College was the lawful owner of the property in its possession; it is immaterial whether it was acquired from The Cincinnati Lancaster Seminary that it succeeded, or by subscriptions and donations subsequently made. This property had been intrusted to it for the purposes of establishing and maintaining a “college,” no specific branches of learning were prescribed, or method of instruction commanded. Primary, academical, medical, legal and philosophical courses were from time to time attempted; all of them except the law school, proved unsuccessful and were abandoned; the latter has been continuously and successfully maintained for nearly sixty years, and substantially the entire income of the institution during that period has been devoted to its maintenance and improvement, without material objection appearing to have been made by any one of the donors. The facts that such donors of the property to this institution, gave it with knowledge that no specific branches of learning or method of instruction were prescribed by its charter, together with the brief history of its various educational attempts and failures just adverted to, and the acquiescence of such donors therein, tend to show that these donors entrusted to this chosen instrument of their will a wide discretion respecting the course and method of instruction to which their donations were to be devoted, and if good faith is to be kept with these donors, we must deny to the legislature the powers to seize the fund thus raised, and transfer it from these chosen agents to others, in whose discretion they did not confide. This power, we think is prohibited by section 19, of article I, of the constitution of 1852, which declares the inviolability of private property. This conclusion makes the consideration of the other questions raised in argument unnecessary.

Judgment affirmed.

YEATON v. BANK OF THE OLD DOMINION.

1872. 21 *Grattan (Virginia)*, 593.¹

ASSUMPSIT by the Bank to recover a debt due from Yeaton. The Bank of the Old Dominion was a Virginia corporation, located in Alexandria; with a branch bank at Pearisburg. The branch bank was not an independent corporation operating under a charter from the legislature, but was simply the agent or branch of the Bank of the Old Dominion, subject to the charter of its principal or mother bank. The legislature reserved "the right to repeal, alter or modify the charter of any bank at its pleasure." At the trial the defendant claimed the right to pay his debt to the Bank of the Old Dominion by tendering certain notes issued by the branch Bank of the Old Dominion at Pearisburg, equal in amount to the debt due to the plaintiff.

The Code of 1860, Chapter 58, Section 16, provides as follows: "though a bank have a branch, all its notes shall be signed by the president and countersigned by the cashier of the parent bank. All such notes shall be received in payment of debts to the bank, whether contracted at the parent bank or branch." In 1862, Alexandria was within the lines occupied by the Federal troops, and continued to be under the U. S. authority during the civil war. In 1862, Pearisburg was within the Confederate lines. March 29, 1862, the Virginia Legislature, at Richmond, passed an act authorizing banks to issue notes of a less denomination than five dollars, to an amount not exceeding ten per cent of their capital. May 16, 1862, an act was passed amendatory of the last mentioned act, containing the following provision: "Provided further, that if any bank be disabled from complying with this act by reason of its being within the lines of the enemy, each branch of such bank not within the lines of the enemy, is required [under certain penalties] within ninety days from the passage of this act, to issue such notes (that is, notes of less denomination than five dollars), to an amount equivalent to ten *per centum* of the capital of such branch, independently of the bank of which it is a branch." The act of May 16, 1862, also provides that "notes hereby authorized to be issued may be signed by such officer or officers of such bank or branches as may be designated for that purpose by the respective boards of directors." The notes tendered in the present case were issued under the alleged authority of the above statutes, and were signed by the president and cashier of the branch bank. It was contended that the above acts of 1862 should be regarded as amendments of the charter of the Bank of the Old Dominion, under the power reserved to the legislature to repeal, alter or modify bank char-

¹ Statement abridged. Part of opinion omitted. — Ed.

ters. It was admitted that neither the directors nor the stockholders of the Bank of the Old Dominion ever accepted any change or modification of the charter of said bank.

In the court below, the case was submitted upon agreed facts, and judgment was rendered for the plaintiff. To this judgment a writ of error and supersedeas was awarded.

Brent & Wattles, and *Neeson*, for appellant.

Cloughton, for appellee.

CHRISTIAN, J.

The power of the Legislature "to repeal, alter or modify the charter of any bank at its pleasure," must be held to be limited to this extent. It may certainly repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank *without its acceptance*. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a *contract*, and therefore, in order to complete the creation of such corporations, something more than the mere *grant* of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be *accepted*. It is clear that the government cannot enforce the acceptance of a charter upon a private corporation without its consent. *Angell & Ames on Corporations*, § 81; *Rea v. V. Ch., &c. of Cambridge*, 3 Burr R. 1647, 1661; 3 Hill's R. 531. As was said in *Ellis v. Marshall*, 2 Mass. R. 279: "That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." The terms offered by the government may, therefore, be acceded to or refused by the body corporate, and, if not acceded to, they have no binding effect. *Dartmouth College v. Woodward*, 4 Wheat. R. 518; 1 Greenl. 79; 10 Wend. R. 266; 1 Story's Eq. 207. These well settled principles are everywhere recognized as applicable to the original charters of incorporation; and upon principle and authority they apply with equal force to any *amendment or modification* of the charter as well as to the original charter. Though the Legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification, than it could have forced upon them the acceptance of the original charter without their consent. Under the reservation they can repeal or destroy the charter, without any consent on the part of the corporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter. The power reserved by the Legislature gives the right certainly to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of

the other contracting party. These principles grow out of the nature of charters or acts of incorporation, which are regarded in the nature of contracts. The amendment or modification must be made by the parties to the contract, the Legislature on the one hand, and the corporation on the other, the former expressing its intention, by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance.

The reservation of the right to alter, amend or repeal the act by which the corporation is created, may be prudent and salutary; but it seems to be a necessary implication, that if the Legislature should undertake to make what in their opinion is a legitimate alteration or amendment, the corporation has the power to reject or accept it, whatever may be the consequences. One consequence undoubtedly is, that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body. But such amendment or modification cannot be forced upon the corporation without its consent. *Sage, &c., v. Dillard, &c.*, 15 B. Mun. R. 340; *Allen v. McKean*, 1 Sumner's R. 277; *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen's R. 230. Every amendment or modification of a charter of incorporation is nothing more than a *new contract*, which is not binding upon the corporate body until accepted by them.

Applying these doctrines, which seem to be well settled, to the case before us, it is manifest that the Bank of the Old Dominion cannot be held bound by the acts of 1862 as amendments of its charter; the facts agreed being "that neither the board of directors nor the stockholders of said bank ever accepted any change or modification of the charter of said bank subsequent to the 24th of May 1861." This would be true upon the authorities cited, even if the Bank of the Old Dominion had been located within the territorial jurisdiction of the Richmond Legislature. But when it is remembered that this bank was located at Alexandria, which was taken possession of by the Federal authorities on the 24th May 1861, who held such possession until the close of the war; that the restored government of Virginia extended over the city of Alexandria during the war and at its close; that the majority of its stockholders, both in number and amount, resided in Alexandria and in States north of the Potomac; that a majority of its directors lived in the city of Alexandria and acknowledged allegiance to the so-called restored government; in the light of all these facts, it is manifest that this corporation thus situated in respect to its location, its stockholders and board of directors could not, in any respect, be affected by any legislation of the Richmond government. That government, it is true, as a *de facto* government, exercised its authority within the limits of its jurisdiction, over all matters, civil and local, and obedience to its authority was not only a necessity, but a duty.

Thorington v. Smith, 9 Wall. U. S. R. 1. But its jurisdiction could certainly not be extended beyond its territorial limits, into sections of the State in the permanent occupancy of the Federal armies, and under the acknowledged authority of the so-called restored government of Virginia. *Bank of the Old Dominion v. McVeigh*, 20 Gratt. 457.

It is no answer to this view that the *branch bank* at Pearisburg was within the territorial jurisdiction of the Richmond government, and subject to its authority. This bank was not an independent corporation. It had no charter; it was but a branch of its mother bank at Alexandria, *subject to its charter*. It was but the agent, the mother bank being its principal. It could do no act to bind its principal, without the consent and authority of that principal. Nor could the Legislature authorize the branch bank which owed its existence to the charter of the mother bank, to issue small notes, or to do any other act as a bank, without the consent of the mother bank. The only authority which the Legislature could exercise was that which it reserved under the power "to repeal, modify or alter" the charter of the mother bank. I have already shown that this was not done by the acts of 1862, which could not operate upon the Bank of the Old Dominion as a change or modification of its charter.

STAPLES, J., concurred in the judgment of the court; but he did not concur in the views of CHRISTIAN, J., upon the power of the General Assembly to modify the charters of corporations.

MONCURE, P., concurred in the opinion of CHRISTIAN, J.

Judgment affirmed.

CHAPTER XVIII.

RIGHT OF CORPORATE CREDITOR TO COMPEL SHAREHOLDER
TO PAY THE FULL PAR VALUE OF HIS STOCK. RIGHTS
OF SHAREHOLDERS *INTER SESE* TO COMPEL SUCH
PAYMENT.SAWYER *v.* HOAG.1873. 17 *Wallace* (U. S.), 610.¹

APPEAL from the U. S. Circuit Court for the Northern District of Illinois.

Bill in equity by Sawyer against Hoag, assignee of the Lumberman's Insurance Company of Chicago, to enforce an alleged right of set-off. In 1865 the company was incorporated and authorized to begin business on a capital of \$100,000, of which not less than one-tenth should be paid in, the residue to be secured. The directors stated to most of those invited to subscribe that only 15 per cent would be required to be paid down in cash, and that the remaining 85 per cent would be lent back to the subscriber, and a note taken therefor payable in five years, with seven per cent interest, secured by collateral. In 1865 Sawyer, upon the above understanding, subscribed for fifty shares of the par value of \$100 each. He gave his check to the company for \$5000, and his note payable to it in five years for \$4250 (85 per cent of the par value of the stock) with interest; delivered to the company satisfactory collateral security; and received from the company a check for \$4250, by way of, and as for a loan thereof, from the company. He also gave the company authority to sell the securities in case of default in payment of the note or the interest thereon.

Subsequently Sawyer took up the above note, and gave in substitution another note.

The original transaction was treated by the company and by Sawyer as a loan by the company to him, and his stock was treated as fully paid for. At various times after the giving of the note, the company reported to the authorities of the State of Illinois and of other States that its capital stock was fully paid.

¹ Statement abridged. Arguments omitted. — Ed.

In October, 1871, the company was rendered insolvent by the great fire in Chicago.

In January, 1872, Sawyer, having then good reason to believe that the company was insolvent, purchased of one Hayes, for 33 per cent of its par value, a certificate of an adjusted loss for \$5000 against the company.

In June, 1872, a petition in bankruptcy was filed against the company; and, it having been adjudicated a bankrupt, Hoag was appointed its assignee.

Hoag demanded of Sawyer payment of the note for \$4250. Sawyer insisted that, under Section 20 of the Bankrupt Act, he had a right to set off the certificate of adjusted loss for \$5000. Hoag refused to allow the set-off, and was about to sell the collateral securities in accordance with the authority given by Sawyer to the company. Thereupon Sawyer filed the present bill to enforce the set-off; alleging, among other things, that the note given by him to the company was for money lent to him. The assignee, in his answer, denied that the note was for money lent, and averred that it was in fact for a balance due by Sawyer for his stock subscription which had never been paid.

The case was submitted to the court below on an agreed statement of facts. That court decreed against the complainant, Sawyer, who appealed to this court.

D. L. Storey, and *C. Hitchcock*, for appellant.

J. N. Jewett, for appellee.

MILLER, J. The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of \$100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, \$5000. He took the check of the company for \$4250, being the amount of his subscription less the 15 per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at 7 per cent. per annum. The appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than 7 per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money

was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely, *Burke v. Smith*,¹ and in *New Albany v. Burke*.² Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad com-

¹ 16 Wallace, 390.

² 11 Id. 96.

pany, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further inquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate inquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.¹

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred instalments properly secured.

It is said by the appellant's counsel that conceding this, it is still a

¹ See also *Curran v. State of Arkansas*, 15 Howard, 304; *Wood v. Dummer*, 3 Mason, 305; *Slee v. Bloom*, 19 Johnson, 456, and numerous other cases cited by the counsel for the appellees.

debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under the twentieth section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be

subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.¹

These principles require the affirmation of the decree in the present case, and it is accordingly *Affirmed.*

Mr. Justice HUNT dissented, holding that the transaction was a loan by the company to the appellant.

IN RE GREAT NORTHERN AND MIDLAND COAL CO.
CURRIE'S CASE.

1862. 3 *De Gex, Jones, & Smith*, 367.²

APPEAL by Currie and four other persons from an order in the winding-up of the company, placing them on the list of contributories, and making a call upon them in respect of certain classes of shares held by them.

The appellants held 100 shares transferred to them by one Butcher, which were originally allotted to him as paid-up shares in part of the consideration of property purchased by the directors from him. The appellants were also holders of other paid-up shares taken by them for attendance fees as directors. The validity of the purchase by the company from Butcher was in dispute; as was also the legality of the payment of attendance fees without the sanction of a general meeting.

Daniel and Hardy, for appellants.

Bacon and Roxburgh, for the official liquidator.

THE LORD JUSTICE TURNER.

These shares were allotted to *Butcher* under the authority given by the articles as paid-up shares in part of the consideration of the purchase made by the directors from him. That purchase was either valid or invalid. If valid it is clear that neither he nor his alienees can be called upon to contribute in respect of these shares. If invalid, I cannot see my way to hold that either a Court of law or a Court of equity could do more than treat the purchase as void, and undo the transaction altogether. It could not, as I apprehend, be competent either to a Court of law or to a Court of equity to alter the terms of

¹ *Lawrence v. Nelson*, 21 New York, 158.

² Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

the purchase, and treat as shares not paid-up shares which were given as paid-up shares in part consideration of the purchase. Fraud, assuming there was fraud, would of course warrant the Court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorize any Court to substitute other terms.

As to the shares taken for attendance fees, I am also of opinion that the Appellants are not liable to contribute in respect of those shares. They were taken, and, as it seems to me, improperly taken, as paid-up shares, but the same principles which apply to the 100 shares apply, as I think, to these shares also. The transaction might be undone but could not be modelled.

SCOVILL v. THAYER.

1881. 105 U. S. 143.¹

ERROR to U. S. Circuit Court for the District of Massachusetts.

The defendant was the holder of 285 shares of the first two issues of stock of the Fort Scott Coal and Mining Company, a corporation organized under the General Laws of Kansas. The par value was \$100 per share. On 200 of defendant's shares he paid only \$20 per share; and on the remaining 85 shares he paid only \$40 per share. By agreement made at the date of the several issues of stock, the amounts paid thereon were credited to the subscribers, and the balance unpaid credited by "discount," and certificates as for full-paid shares were delivered to the subscribers, and the stock account between the company and them balanced by such "discount." In April, 1874, the company was adjudicated a bankrupt in the U. S. District Court for Kansas; and plaintiffs were appointed assignees. In 1876, in accordance with an order of the U. S. District Court, the assignees made an assessment upon the stock of the company of 76 per cent, upon which should be credited to each stockholder any sums paid by him on his shares.

The defendant having failed to pay within the time limited by the order, the assignees sued him in the present action at law to recover the amount of the assessment.

The defendant pleaded: 1st, a general denial; 2d, the limitation of two years prescribed by the Act of March 2, 1867, Ch. 176, Sect. 2 (now embodied in Revised Statutes as Section 5057). This statute provides, in substance, that no suit at law or in equity shall be maintainable between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transfer-

¹ Statement abridged. Portions of opinion omitted. — Ed.

able to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.

The case was submitted to the Circuit Court upon an agreed statement of facts. The Court rendered judgment for defendant, holding that the cause of action was barred by the limitation of two years.

J. E. McKeighan, and *A. A. Ranney*, for plaintiffs in error.

Sidney Bartlett, *William G. Russell*, and *George Putnam*, for defendant in error.

WOODS, J.

We are next to consider whether, upon the facts as disclosed by the record, the defence of the Statute of Limitations should have been sustained. The precise question with which we have to deal is, When would this action at law, brought by the assignees of the bankrupt company against a stockholder, to recover a part of the balance due on his stock, be barred by the statute?

This will depend on the answer to the question, When did the cause of action accrue to the assignees? In other words, When could they have commenced this action against this defendant to recover the amount due on his stock? *Wilcox v. Plummer's Ex'rs*, 4 Pet. 172; *Amy v. Dubuque*, 98 U. S. 470.

The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter.

If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock, which had been satisfied "by discount" according to their contract, they could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company.

In fact, it has been held in recent English cases that not only is the company but its creditors also are bound by such a contract. *Waterhouse v. Jamieson*, Law Rep. 2 H. L. (Sc.) 29; *Currie's Case*, 3 De G., J. & S. 367; *Carling, Hespeler, and Walsh's Cases*, 1 Ch. D. 115.

But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full. *Sawyer v. Hoag, Assignee*, 17 Wall. 610; *New Albany v. Burke*, 11 id. 96; *Burke v. Smith*, 16 id. 390.

The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. *Wood v. Dummer*, 3 Mas. 308; *Mumma v. Potomac Co.*, 8 Pet. 281; *Ogilvie v. Knox Insurance Co.*, 22 How. 387; *Sawyer v. Hoag*, *supra*. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at his instance require it to be paid.

In this case the managers and agents of the bankrupt company had in effect represented to the public that all its capital stock had been subscribed for, and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the company and its stockholders was this, namely, that the stockholders should pay, say, for example, twenty dollars per share on their stock and no more, unless it became necessary to pay more to satisfy the creditors of the company, and when the necessity arose and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required.

When the company was adjudicated a bankrupt, the assignees were bound by this contract, thus equitably construed. Their duty was to collect a sufficient sum upon the unpaid stock, which, with the other assets of the company, would be sufficient to satisfy the company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock. For if in a bankruptcy proceeding any surplus remained after payment of debts, it would go to the company and not to the stockholders. And we have seen that the company in this case would have no right to any surplus.

The question for solution is, therefore, When, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.

It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. *Curry v. Woodward*, 53 Ala. 371; *Robinson v. Bank of Darien, &c.*, 18 Ga. 65; *Ward v. Griswoldville Manufacturing Co.*, 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. *Van Hook v. Whitlock*, 3 Paige (N. Y.), 409; *Salisbury v. Black's Adm'r*, 6 Har. & J. (Md.) 293; *Sinkler v. The Turnpike Company*, 3 Ea. 149; *Walter v. Walter*,

1 Whart. (Pa.) 292; *Quigg v. Kittredge*, 18 N. H. 137; *Nimmo v. Walker*, 14 La. Ann. 581.

In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.

But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder to the effect that the latter should not be required to make any further payments on his stock should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was in effect a proceeding to accomplish two purposes: first, to set aside the contract between the company and the stockholder; and, second, to fix the amount which he should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.

It appears from the petition of the assignees for an assessment upon the stock of the bankrupt company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the court for an order directing that the stockholders should pay a part of the amount due on their shares of stock, and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment.

If, therefore, the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the court, and the stockholders were required to pay it, the action was brought long before the limitation of the statute could bar it.

The case of *Terry v. Anderson* (95 U. S. 628), also relied on by the defendant, was a suit in equity to enforce the individual liability of the stockholders of a bank, and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the court held that the Statute

of Limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment.

But in the present case, as we have seen, there was, as between the company and its stockholders, no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think, therefore, we are safe in saying that the statute did not begin to run in favor of the stockholders until at the very least the necessity for the payment had been ascertained, and an authorized demand of payment made.

For the error in holding that the action was barred, the judgment of the Circuit Court must be reversed, and the cause remanded with directions to award a

New trial.

FIELD, J., and GRAY, J., dissented.

O'BEAR JEWELRY CO. v. VOLFER.

1894. 106 *Alabama*, 205.¹

IN EQUITY. The original plaintiffs are Volfer *et als.*, judgment creditors of the O'Bear Jewelry Company, a corporation. The original defendants are: the corporation, Johnston, its assignee under a general assignment for the benefit of its creditors, the Alabama National Bank, and four stockholders of the O'Bear Jewelry Co. The bill alleges that these stockholders have not paid in full for their stock, and seeks to compel them to do so. It also alleges that the Alabama National Bank has received funds of the corporation in fraud of its creditors, and seeks to compel the bank to account for the same. The bill also prays that Johnston, the assignee, be required to file in court his accounts as assignee, and to turn over to the court, or to a receiver, all corporate property in his hands. And finally the bill prays that all the assets thus brought together be administered for the equal benefit of the creditors of the corporation. The bill proceeds upon the theory, "that the entire assets of said corporation constitute a trust fund for creditors."

The Alabama National Bank, and Copeland, one of the alleged stockholders, separately demurred, for misjoinder of parties defendant, and for multifariousness.

In the City Court of Birmingham, the Chancellor overruled the demurrers; and the defendants appealed.

¹ Statement abridged. Arguments and portions of opinion omitted. — Ed.

Ward & John, and Dickinson & Kerr, for appellants.
Arnold & Evans and John Vary, contra.
 McCLELLAN, J.

This whole idea, that the property of insolvent corporations is held by them in trust for creditors — is a trust estate in their hands — and to be administered by chancery as such, originated in a *dictum* of Judge Story in *Wood v. Dummer*, 3 Mason, 308. It had no existence at common law, and has none to this day in the law of England; but is distinctly a creation of some courts in this country, and known in jurisdictions where it obtains as the “American doctrine.” This court has quite recently adopted it, and held in the cases of *Corey v. Wadsworth*, 99 Ala. 68, *Goodyear Rubber Co. v. Scott & Co.*, 96 Ala. 439, and *Gibson v. Trowbridge Furniture Co.*, *Ib.* 357, that the assets of an insolvent corporation is impressed with a trust in the hands of the company, in favor of its creditors first, and then in favor of its stockholders. The present writer dissented from the opinion and conclusion of the court in each of those cases. To his mind, there is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relation to the creditors of such corporation as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual or partnership; and is or is not to be impressed with a trust character upon the same circumstances and under the same conditions in the first case as in the latter two.

[The learned Judge then pointed out that the “trust theory” is inconsistent with the decisions in Alabama, and in some other states, which permit insolvent corporations to prefer one creditor to the exclusion of all others. He also said that the “trust theory” could not be sustained on the ground that the relation between a corporation and its creditors constituted an express trust or a resulting trust. He then proceeds:]

All constructive trusts are of three kinds, or arise from one or the other of three conditions of fact: *first*, trusts arising from actual fraud; *second*, trusts which arise from constructive fraud; and, *third*, trusts that arise from some equitable principle independent of the existence of fraud. — 10 Am. & Eng. Encyc. of Law, p. 60. As there is no fraud, actual or constructive, involved in the naked fact that a corporation is insolvent — has creditors which it is without assets to pay in full — and this fact is the base for all the superstructure of this doctrine of trust for its creditors, it cannot be conceived, and, I suppose, has never been contended, that such trust is referable to either the first or second heads of constructive trusts. And it is the conclusion of so high an authority as Mr. Pomeroy, that the third classification of constructive trusts stated above has no existence dissociated from actual and constructive fraud. It is his opinion, “that all instances of con

structive trusts properly so called may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, the notion of fraud is not involved, simply because it is not absolutely necessary under the circumstances; the existence of the trust might in all cases of this class be referred to constructive fraud. This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud."—2 Pom. Eq. Jur., § 1044. If this view be adopted, the relation between an insolvent corporation and its creditors is excluded from every possible category of constructive trusts for the reason, or by virtue of the fact, that that relation involves no fraud whatever; and as that relation is, as I have seen, the sole ground for the doctrine of trusts in cases like this, the doctrine is unsound, unsupported in principle or reason, and should not be upheld by any court.

But if we adopt the view first stated above, that constructive trusts may arise by force of some equitable principle independent of the existence of fraud, actual or constructive, and which seems also to be the opinion of Mr. Perry (1 Perry on Trusts, § 168), the same conclusion is equally inevitable. Eliminating the element of fraud from the consideration, there still remains as an essential predicate for the existence of a trust by construction of law, some unconscientious conduct on the part of the person to be held as trustee *in invitum*, or some unconscionable result through means or under circumstances which bring the transaction within some recognized title of equity jurisprudence, as, for instance, where a tenant in common buys in an outstanding term for his own benefit, he is trustee for his co-tenant, and where a conveyance has been made through ignorance, accident or mistake, the grantee will be the trustee in a constructive trust for the grantor. Thus, wherever one is placed in such relation to another that he becomes interested with or for him in property or business, he is prohibited from acquiring rights in that property or business antagonistic to the person with whom he is associated, as, for illustration, if one partner, or other person occupying a fiduciary relation, renew a lease theretofore held by the partnership, or by the person renewing and another in confidential relation to him, in his own name and with his own funds, he will be a trustee for his associate by construction of law. And so, where by accident, ignorance or mistake more land is embraced in a conveyance than was bargained and sold, a constructive trust arises in favor of the grantor for the excess.—10 Am. & Eng. Encyc. of Law, p. 80.

But in all these cases, in all cases of constructive trusts where it is said by some authorities chancery proceeds without regard to fraud, relief is granted upon some acknowledged ground of equitable jurisdiction, and administered by holding the wrongdoer to account as a trustee. There must be a confidential relation and unconscientious conduct on the part of one party to, and in abuse of, that relation, or there must be some ignorance, accident, mistake, or the like, against the unconscionable consequences of which equity will on general principles grant relief, else there can be no constructive trust.

That the relation of debtor and creditor is not of a confidential character, there can of course, be no doubt. 'Tis absurd to say that the creation of that relation involves aught of accident, mistake or ignorance. That a debtor has property of his creditor which in equity and good conscience belongs to the creditor, because the debt contracted in its sale has not been paid, there is no warrant for saying. Equally unwarranted is the idea that in equity all the property of a debtor who has become insolvent belongs to the creditor, and is held by the debtor in trust for him. And this idea of *ownership* in the *cestui que trust* underlies the whole doctrine of trusts of every description. In all trusts the legal title is in one, the equitable ownership in another. A mere debt against one who has property, whether solvent or insolvent, is not ownership, nor is a right to charge a fund, or a lien upon it, the beneficial ownership of it. Confessedly the property and assets of a solvent corporation do not constitute a trust fund for its creditors. Can it be possible that the mere passing of a corporation from a state of solvency to a state of insolvency, amounts to a declaration of an express trust for creditors, or to a resulting trust upon the theory that title to the assets of the concern should have been made to the creditors? Or is it conceivable that this mutation from the one condition to the other does violence to a confidential relation which never existed, and hence is a constructive trust? Or that this mere change of inherent conditions is the vestiture in the corporation through the ignorance, or mistake of the creditor, or through mistake, or through fraud, of a greater title, or title to more property than was contemplated and intended, when before the change, confessedly, the corporation had the absolute and indefeasible title free from all trusts to all its property and assets, and when the change itself involves nothing of fraud, of abuse of fiduciary relations, of ignorance, or mistake or accident? The learned judges who uphold this "American doctrine" may find something in these conditions of fact upon which to construct a trust, but I confess my utter inability to follow their arguments or to see with their eyes. Nothing is clearer to my humble judgment than that the insolvency of a corporation—the existence of a corporation with property and debts, the property being insufficient to pay the debts—is not within any definition of any trust known to equity jurisprudence. The creditors of such corporation have the same rights against it as they have against an insolvent partnership, or an insolvent individual,

debtor and no other or more. They do not at law or in equity own the property of the one or the other; but the property of each is a fund for the payment of debts in the sense that neither can give it away, or dispose of it with intent to hinder, delay or defraud creditors. The property of the individual cannot be appropriated to his own use to the exclusion of his creditors under any cover whatever. The property of the partnership cannot be appropriated to the personal use of the partners, or in payment of the debts of the individuals composing the firm, to the exclusion of partnership creditors under any pretense whatever. And so, the property of the corporation cannot be diverted to the use of the stockholders to the exclusion of creditors under any circumstances whatever. The powers and limitations upon the powers of an insolvent corporation to deal with its property are precisely the same in all essentials as the powers and limitations upon the powers of insolvent individuals and insolvent partnerships. The estate of the debtor in each class is essentially the same — the corporation, no less than the individual and the partnership, is at law and in equity the owner of its property. The rights, remedies and estates of creditors of each are also the same. They do not *own* the property of their corporation debtor, or any interest in it, in equity or at law, any more than they own the property of their individual or partnership debtor. Their right against each is the same, to have their debts paid out of the property, but this right is not that of a *cestui que trust*, but, whether the property is corporate or individual or partnership, it is the right of a creditor simply. Confessedly even this right may be defeated as to any particular creditors by a sale of the property in payment of another creditor, or by its being taken on execution in favor of another, or even by its sale by the debtor — corporation, individual or partnership — to a third person, and this although such purchaser have notice of the insolvency of the debtor. All which, as I have seen, would be impossible if the property constituted a trust estate, with the corporation as trustee and the creditors as *cestuis que trust*, for in such case all who take with notice of the insolvency would take subject to the trust and themselves be held as trustees *in invitum*.

Not only are the rights of individual, partnership and corporation creditors the same against their insolvent debtors' estates, and each different in the same way from the rights of *cestuis que trust*, but the remedies of a corporation creditor, in the absence of a statute, are precisely those of a creditor of an individual or partnership. The remedy of each class of creditors may upon a given state of facts be in equity; but when this is so, it is not because of any supposed trust, but upon some recognized ground of equity jurisprudence, as where the debtor has fraudulently transferred his or its property, and chancery is invoked to set aside the transfer and subject the property. And when chancery has thus assumed jurisdiction, it will administer the estate for the equal benefit of all creditors before it, and to that end the court becomes a sort of trustee *sub modo*, in the administration of the property, but not

with any reference to the character of the estate, as being held in trust or otherwise, before and at the time jurisdiction attached.

Not all the publicists and courts in this country, nor the ablest of them, countenance this so-called American doctrine. Mr. Pomeroy expressly repudiates it. He says: "In applying this principle [of constructive trusts], care should be taken to distinguish between actual trusts and those relations which are only trusts by way of metaphor; between persons who are true trustees holding the legal title for a beneficial *owner*, and those who simply occupy a position which is analogous in some respects to that of a trustee. The use of these terms to designate relations and parties which have no essential element in common with actual trusts and trustees can only produce confusion and inaccuracy. . . . There are certain relations which are spoken of as trusts, and as constituting a species of constructive trusts, but which are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor. Since they lack the element of fraud, they do not, in any view, properly belong to the division of constructive trusts. . . . The survivors of a partnership are called trustees for the estate of the deceased partner, with respect to his share of the firm property. This expression is mostly metaphorical; there is certainly nothing in the relation resembling a constructive trust. Extending the analogy still further, courts regard partnership property, after an insolvency or dissolution of the firm, and in the proceeding for winding up its affairs, as a trust fund for the benefit of creditors, and the capital stock and other property of private corporations, especially after their dissolution, is treated as a trust fund in favor of creditors. These statements may be sufficiently accurate as strong modes of expressing the doctrine that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of individual partners or corporators, *and that the creditors have a lien upon it* for their own security; but it is plain that no constructive trust can arise in favor of the creditors, unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property, and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means." And in a note to the above text the learned author says: These "cases are not constructive trusts, and are mentioned simply for the purposes of completeness, and to distinguish between correct and mistaken conceptions." — 2 Pomeroy's Eq. Jur. §§ 1044, 1045.

And the highest and ablest court in the land, the Supreme Court of the United States, has quite recently gone over this whole subject, considered exhaustively all its own decisions and *dicta* upon it, and in an able opinion by Mr. Justice Brewer repudiated the idea that the property of an insolvent corporation is a trust fund or estate held by the corporation or its officers for creditors as *cestuis que trust*. Judge Brewer quotes the language of Judge Bradley in *Graham v. Railroad*

Co., 102 U. S. 148, to the effect that when a corporation becomes insolvent, a court of equity, at the instance of proper parties, "will then make its funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his," and says of that case, that "all that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself." And he proceeds further on to say: "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder;" and he concludes his opinion upon this subject as follows: "the same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors, or, that they have an equitable lien on such property. Yet, all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien, or a direct trust.

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor, altogether, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon." — *Hollins v. Briarfield Coal & Iron Co.*, 150 U. S. 371, 381-386.

The Supreme Court of Minnesota, in an able opinion by MITCHELL, Justice, also repudiates this idea that the property of an insolvent corporation is a trust fund. Of it it has this to say: "This 'trust fund' doctrine, commonly called the 'American doctrine,' has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case

that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice STORY in *Wood v. Dummer*, 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two-thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding bill-holders. Upon old and familiar principles, this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders — a proposition that is sound, upon the plainest principles of common honesty. In *Fogg v. Blair*, 133 U. S. 534, 541, it is said that this is all the doctrine means. The expression used in *Wood v. Dummer*, 3 Mason, 308, has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that “the capital of a corporation constitutes a trust fund for the benefit of creditors, is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests — one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further.” — *Hospes v. Northwestern Manufacturing Co.*, 48 Minn. 174, s. c. 31 Am. St. Rep. 637, 641-2.

[After quoting from *Bank of Montreal v. Potts Salt & Lumber Co.*, 51 N. W. Rep. 512; S. C. 90 Mich. 345; and *Gould v. L. R. & C. Ry. Co.*, 52 Fed. Rep. 683; the opinion proceeds:]

Other authorities might be collated on the question under consideration and in support of the view I have taken of it; but the foregoing will suffice, it is thought, for the purposes of this opinion. Upon them and by the force of the elementary principles of trust estates, I am impelled to the conclusion that the property of an insolvent corporation is not a trust fund or estate accurately speaking, or in any sense other than that when the chancery court takes possession and control of such property upon some general principle of equity jurisdiction, wholly independent of any idea that the property constitutes a trust fund, it will be administered for the equal benefit of creditors. It follows that the bill cannot stand against the demurrers for multifariousness unless that objection can be met upon some other consideration than the trust character of the corporation property and assets, which is alone and

expressly, both in the averments of the bill itself and in the argument of counsel, relied on to support the decree overruling the demurrers. I do not think the objection can be met upon any other ground. There is no connection between several of the matters brought forward by the bill, and the defendants attempted to be charged in respect of some of these matters have no interest whatever in others. For instance: The Alabama National Bank did not participate in the wrongs committed upon the corporation in respect of the subscriptions to its stock by the O'Bears and Copeland, and it is not interested in the present effort to right those wrongs. Again, the bill seeks the settlement of the trust created by the assignment to R. D. Johnston and to compel the bank to pay into court money which it owed the corporation, or held belonging to the corporation, and paid over to the stockholders of the corporation, which constituted no part of and had no connection with the assignment to Johnston. And equally dissociated is the effort of the bill to have an accounting by the assignee from its purpose to collect unpaid subscriptions from stockholders. And so in respect of the purpose of the bill to have the judgment in favor of the bank declared a part of the assignment and to have the bank refund the amount it received in satisfaction thereof: this claim is wholly foreign to the relief sought against the bank as to the insurance money paid to the O'Bears and Copeland, and also to the relief sought against the subscribers to the stock. In other words and in brief, the bill, in my opinion, stands upon the same plane in respect of multifariousness as if it had been filed against an insolvent individual debtor, who was wasting or fraudulently disposing of his property, and against his assignee for the benefit of creditors, a creditor to whom he had confessed judgment which his assignee had paid as a lien on the property assigned, against a person who, having assets of the insolvent debtor in his hands, had paid the same to third persons, so they could not be reached by creditors, and against other persons who, in equity, owed money to the debtor defendant. In such case — and no more in this — there would be no relation or connection between the defendants, or the rights asserted against them respectively either in the character of their wrongs or defaults, or in the character of the estate they had despoiled; and recovery against each would be had, if allowed at all, not upon any idea of conserving a fund which the court, because of its trust character, had the right to protect and restore, but solely as enforcing several money demands from several defendants in one and the same action, in which also the trustee in the assignment would be brought to account on considerations and in respect of matters with which the claims against some of the other defendants had no connection.

In preparing the foregoing opinion, the writer assumed to express his individual views only because of decisions of this court referred to above which take a different view as to the assets of an insolvent corporation being a trust fund. This opinion has now, however, been concurred in by my associates, and stands as the opinion of the court.

The cases of *Corey v. Wadsworth*, 99 Ala. 68; *Goodyear Rubber Co. v. Scott & Co.*, 96 Ala. 439, and *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, *supra*, in so far as they are inconsistent with the views and conclusion we now express, are overruled.

The decree overruling the demurrers for multifariousness is reversed, and a decree will be here entered sustaining said assignments of demurrer.

Reversed, rendered and remanded.

[The opinion of COLEMAN J. is omitted.]

HASTINGS MALTING CO. v. IRON RANGE BREWING CO.

1896. *Supreme Court of Minnesota.*¹

65 Minn. 25

ACTION by plaintiff, on behalf of itself and all other creditors, against defendant corporation and its stockholders, to collect and apply in payment of the claims of creditors an alleged unpaid balance due upon the stock of the defendant stockholders; i. e. the difference between the par value of their stock and the actual value of the property transferred to the corporation in full payment of the stock issued to them.

The Iron Range Brewing Company is a corporation, organized under the laws of Minnesota, in 1892, with a capital stock of \$30,000, divided into 600 shares of \$50 each.

July 1, 1892, the defendant Graff and others, partners under the name of M. Fink & Co., were owners of a brewery property at Tower, Minnesota, which was of the actual worth and value of \$18,000. On that day the firm sold and transferred the brewery property to the Iron Range Brewing Company; and, in consideration of this transfer, the 600 shares, which constituted the entire capital stock of the corporation, were issued to the partners as fully paid up stock.

The trial court found, "that the sale of the stock to the defendants in consideration of the property was made in good faith by the defendants, and without any intent to defraud or deceive any of the plaintiffs in this action, or any prospective creditor of the corporation."

The defendant corporation is insolvent, and before the commencement of this action the plaintiff recovered judgment against it for the amount of its claim, and execution was returned unsatisfied. Other creditors have become parties to this action, and have proved their claims. The debt of the plaintiff and of all the creditors was contracted after such stock was issued as fully paid.

The trial court, on its findings of fact, ordered judgment for defend-

¹ From copy of opinion furnished by State Reporter. Statement abridged. Portions of opinion omitted. — Ed.

ants. Plaintiff appealed from an order denying its motion for a new trial.

START, C. J.

Are the findings and conclusion of the trial court to the effect that the sale of the property in this case to the corporation for paid up stock was made in good faith, without any intent to defraud creditors, and that it cannot therefore be questioned by them, sustained by the evidence? This is the real question in the case, and we answer it in the negative.

The question as to the liability of stockholders who have received full paid shares of a corporation without in fact having paid in full for them, or received them in exchange for property at an overvaluation to subsequent creditors of the corporation, is one upon which the adjudged cases are in conflict. In some of the cases the conflict is apparent only, for the diversity in the conclusions reached is the result of a difference in the statutes under which the corporations were organized; but all of the cases cannot be thus reconciled. We are, however, relieved from any extended discussions of the law of this case by reason of the principles laid down in the previous decisions of this court. In the case of *First National Bank of Deadwood v. Gustin Mining Co.*, 42 Minn. 327, it was held that where the stock of a corporation was issued as fully paid up, without in fact having been paid to its full par value, equity will hold the shareholders liable for the amount not actually paid in favor of creditors who can be presumed to have given credit to the corporation in reliance upon its apparent paid up capital. The matter was further examined and fully discussed in the case of *Hospes v. Northwestern Manufacturing Co.*, 48 Minn. 174, wherein it was held that the right of creditors to compel holders of stock not paid for to pay for it contrary to their agreement with the corporation rested neither on implied contract nor upon the "trust fund" doctrine, but upon the ground of fraud.¹ The rule and the reason for it, as stated in the opinion, are substantially that the capital of a corporation is the basis of its credit, and a substitute for the personal liability of those who own its stock. People deal with the corporation, and give it credit on the faith of its stock, and they have a right to assume that it has a paid in capital to the amount which it represents itself as having. If the representation is false it is a fraud on creditors; and in case the corporation becomes insolvent, equity will compel the holder of bonus stock, or stock not in fact paid in full, to make the representation good by paying the bal-

¹ In the *American Law Review* for September-October, 1891, vol. 25, pp. 749, 753, Mr. R. C. McMurtrie, in criticising the phrase that the capital of a corporation constitutes a trust fund for the benefit of creditors, said: "Why invent such a phrase to justify the enforcing of the most commonplace rule of equity, viz.: You made a material misrepresentation, make it good. . . . It is the misrepresentation of the fact involved in stating the paid-up capital, or the subscribed capital, to be different from what it really is, when that is the basis of the contract, as it is in all dealings by corporations, — that is the real and true basis of the rule." — Ed.

ance due on their stock to the extent necessary to pay creditors whose debts were contracted subsequent to the issuing stock as fully paid, and who are presumed to have relied on the representation. It is the misrepresentation of fact in stating the amount of capital to be greater than it is in fact which is the basis of the liability of the stockholders in such cases. In principle it can make no difference whether the stock issued as paid up is bonus stock pure and simple, or whether it was sold for cash for less than its par value, or for property at a gross overvaluation. In the first two cases the question of fraud would be one of law, for the issuing by the corporation of its stock as paid, and its acceptance by the stockholders, when in fact nothing was ever paid for it, or a sum of money was paid and accepted for it less than its par value, there is no opportunity for a mistake or error of judgment, and such stockholders cannot be heard to say, after creditors have trusted the corporation on the basis of its apparent paid up capital, and the corporation has become insolvent, that they acted in good faith without any intention to defraud any creditor. The law presumes an intention in such cases to defraud. Where property at a gross overvaluation is given and accepted for paid up stock, the question of fraud is usually one of fact; but there may be cases where the property was of such a character, and the overvaluation so great, as to exclude any possibility of an honest mistake; in such cases it would be the duty of the court to declare the transaction fraudulent as to creditors. Upon principle and authority we hold that a corporation, unless prohibited by some statutory or constitutional provision, may in good faith issue paid up shares of its stock for the purchase of property at a fair valuation; and in such case both the corporation and its creditors will be bound thereby. But if there is a material overvaluation of the property to the knowledge of the contracting parties, the transaction is a fraud as to subsequent creditors of the corporation, without notice; and if it becomes insolvent, the shareholders so paying for their stock will be charged in equity, to the extent necessary to pay such creditors, with the difference between the real value of the property and the par value of their stock. *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; 2 Morawetz on Corporations, s. 825; Taylor on Corporations, s. 545; 23 Am. & Eng. Ency. of Law, 858.

In the practical application of this rule, it must be kept in mind that fraud, actual or constructive, is the basis of the stockholders' liability to the creditor. On the one hand, the value of the property is to be determined, not from subsequent events, but as of the time of the transaction, and from the situation, nature, and condition of the property as they honestly appeared to the parties at the time.

Although there was in fact an overvaluation of the property, it will not render the stockholders liable for the deficiency if it was the result of an honest mistake or error of judgment. On the other hand, where the nature and condition of the property are such that its value is well known and understood, or is capable of being readily estimated and

ascertained, and the property is transferred to the corporation at a gross overvaluation for paid up shares, the transaction is *prima facie* fraudulent as to subsequent creditors, and as against them the burden is upon the shareholder to rebut the presumption by clear and satisfactory evidence. If he knew, or ought to have known, that he was paying for his stock in property at a material overvaluation, it will not be sufficient for him to show as a mental operation that he did not intend to defraud anyone. He must go further, and show that, in the exercise of ordinary business sense, he was justified in believing, and did honestly believe, that the property was being turned in at a fair valuation. Where the facts are undisputed, and the overvaluation so great as to show that the stockholder ought to have known it if he had exercised ordinary business prudence, his actual belief or intention in the premises will not avail him; he will be presumed to have intended the reasonable and natural consequences of his act, which is to defraud creditors in case of the insolvency of the corporation.

An examination of the evidence in this case, in the light of these suggestions, shows that the finding of the trial court, to the effect that the sale of the property in question to the corporation for paid up shares of its capital stock was made in good faith, is manifestly against the evidence. The value of the property at the time of the transaction, as found by the court, was only \$18,000. This, under the evidence, was a very liberal estimate. The title of the property was originally in the name of the firm, M. Fink & Co., yet for all practical purposes the defendant Graff was the owner of it, for he was a member of the firm, and had furnished the money which built the brewery, and bought the property sold to the corporation. The building of the brewery was commenced in the fall of 1891, and in June, 1892, shortly after the brewery was completed and equipped for business, the real owner of the property entered into an agreement with three other persons, who were without capital, so far as appears, to organize a corporation to purchase the property for the stock of the corporation. The corporation was organized by these persons with a capital of \$30,000. Paid up stock to the amount of \$30,000 was then issued by the corporation in payment of the property which was worth only \$18,000. That is, the property was taken by the corporation at an overvaluation of $66\frac{2}{3}$ per cent: or, in other words, the stock was issued as paid up for property worth 40 per cent less than the par value of the stock. The property was of such a nature that its real value could be readily estimated and ascertained. The building had been erected, and the machinery, fixtures, and appliances of the business purchased only a short time previously. Under these circumstances the overvaluation was so gross as to raise, unexplained, a conclusive presumption of fraud, and justify the conclusion that the transaction was not *bona fide*, but a mere device to obtain paid up stock for not more than 60 per cent of its par value,—a stock watering scheme. It would seem that the corporation and the defendant Graff knew, or must have known,

that the property was turned in at a very material overvaluation. To assume that he did not know this would be an impeachment of his intelligence. The burden then rested on him to rebut the presumption of fraud by clear and satisfactory evidence. We are of the opinion that he failed to do so.

[The learned Judge here recapitulated the testimony of Graff.]

There was no other witness on the part of the defence as to the value of the property, or the good faith of the transaction. Any comment on the defendants' evidence would seem to be unnecessary. It cannot be held to rebut the presumption of fraud arising from the known gross overvaluation of the property. It is suggested on behalf of the defendants that the transaction was spread out on the records of the corporation, and if the subsequent creditors had examined the records before trusting it, they would have ascertained just the consideration paid for the stock. As to third parties, the record-books of a corporation are private, and such persons are not charged with knowledge of matters therein recorded. Creditors are not bound to examine the record-books of the defendant corporation before trusting it, and such records are not notice to them. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

Order denying a motion for a new trial is reversed, and a new trial granted.

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FIRST NATIONAL BANK OF DEADWOOD v. GUSTIN, &c. MINING CO. ET ALS.

1890. 42 *Minnesota*, 327.¹

ACTION upon a debt of defendant corporation, and against the other defendants as stockholders, to obtain judgment against the corporation for the amount of the debt, and against the other defendants for the respective amounts alleged to be due and unpaid on the stock held by them, so far as necessary to satisfy the judgment against the corporation.

The defendant corporation was organized November 13, 1886, for the purpose of consolidating two other companies, acquiring their property, and with the property so acquired carrying on a general mining business. The nominal capital was 250,000 shares of \$10 each. 100,000 shares were issued to the stockholders of the two old companies as paid up stock, but it was not paid for except by conveying the property of the old companies, which every one understood to be worth very much less than the par value of this amount of stock. The stock so issued was called "Old Company Stock."

¹ Statement abridged. Part of opinion omitted. — ED.

It was never expected or intended by the corporation, or by those to whom the stock was issued, that any capital stock should ever be taken, or any capital paid in, except by conveyance to the corporation of the mining properties aforesaid, and by the sale of the remaining stock in open market for such sum as could be obtained therefor.

The plaintiff bank was a creditor of one of the old companies, and accepted the notes of the defendant company in place of those of the old company. The managing officer of the bank who accepted these notes then knew all the above facts relative to the organization and plan of the defendant corporation.

Subsequently the remaining stock was offered for sale in open market by the corporation, and part was purchased by some of the defendants, at a price exceeding its fair market value, but very much less than its par value. The stock so sold was called "Treasury Stock." In March, 1887, the directors distributed *pro rata* among the individual shareholders all the stock remaining unsold in the treasury. This was called "Pro Rate Stock."

The District Court ordered judgment against the corporation for the amount of plaintiff's claim, but in favor of the other defendants. Plaintiff appealed.

John B. & W. H. Sanborn, and G. E. Moody, for appellant.

Warner & Lawrence, for respondents.

MITCHELL, J.

The contention of the plaintiff is that the defendant shareholders are individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they have actually paid therefor, viz., nine dollars per share on the old company and treasury stock, for which they paid in value only one dollar per share, and ten dollars per share on the pro rate stock, for which they paid nothing. If these stockholders were indebted to the corporation for unpaid instalments on stock, this debt would be an asset of the corporation which, in case it became insolvent, any creditor might always enforce for the purpose of satisfying his claim. But it is very clear from the facts that the defendant company has no claim against the defendant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold, or given away, as fully paid stock, is entirely valid. But the plaintiff bases its claim upon the familiar doctrine that the capital stock of a corporation is a trust fund for the benefit of its creditors, and that, if shares are not in fact paid up, an arrangement between the corporation and the shareholders that they shall be deemed paid up, although valid between the company and the stockholder, will be ineffectual as to creditors, and that equity will hold the shareholder liable for the amount not in fact paid on his stock, to the extent necessary to satisfy the demands of creditors. We waive consideration of the question (which may, at least, admit of doubt) whether plaintiff's complaint is

sufficient to entitle it to such relief. See *Phelan v. Hazard*, 5 Dill. 45; Cook, Stocks, § 47; *Scovill v. Thayer*, 105 U. S. 143.

The general proposition advanced by plaintiff cannot be controverted, but the principle upon which this trust in favor of creditors rests and is administered must not be overlooked. The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist the rule itself ceases to apply. This trust does not arise absolutely in every case, in favor of every and any creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than that it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. For example, to distribute the capital among the shareholders without provision for paying corporate debts would be a fraud on existing creditors, as well as on such subsequent creditors as deal with the corporation in reliance upon the assumption that its professed capital remains intact. An illustration of this kind is to be found in the very first case in which what is now called the "American doctrine" was announced by Justice Story. We refer to the case of *Wood v. Dummer*, 3 Mason, 308, where a banking association distributed three-fourths of its capital among its shareholders without providing for the payment of bill-holders, and the court impressed a trust in their favor upon the capital in the hands of the shareholders. So, again, where corporations have organized and engaged in business with a certain amount of ostensible and professed paid-up capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called "paid-up," and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital. To this class belong many of the cases cited by plaintiff, as, for example, *Sawyer v. Hoag*, 17 Wall. 610; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

While the courts have not always had occasion to state the limitations upon the doctrine that "the capital is a trust fund for the benefit of

creditors," yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders, it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors. If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets. *Coit v. Gold Amalgamating Co.*, 14 Fed. Rep. 12, same case 119 U. S. 343, (7 Sup. Ct. Rep. 231.) This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors.

These views effectually dispose of the question of the liability of the defendants, at least on account of their old company and treasury stock. We think it also logically follows from what we have said that the defendants are not liable to the plaintiff upon their "pro rate" stock as for unpaid stock subscriptions. This stock had not been issued when plaintiff's debt was contracted. It could not have dealt with the company on the faith of any capital represented by these shares. In fact, it knew that no such capital had been paid in, unless the mining properties of the two old companies can be considered as represented in part by them; and the value of these properties remained the same, and they were equally available to creditors, whether represented by 100,000 shares or 250,000 shares of stock. Under such circumstances, the plaintiff has no equitable right to insist on the contribution of a greater amount of capital by the holders of these shares than the corporation itself could insist on. 2 Mor. Priv. Corp. §§ 832, 833.

Judgment affirmed.

COIT v. GOLD AMALGAMATING CO.

1886. 119 U. S. 343.¹

APPEAL from U. S. Circuit Court for Eastern District of Pennsylvania.

This was a bill in equity against a corporation and its stockholders to enforce a debt due from the former, against the latter. The case is stated in the opinion of the Court.

Edward F. Hoffman, and *Charles Hart*, for appellant.

R. C. McMurtrie (*Pierce Archer* with him), for appellee.

FIELD, J. The defendant, the North Carolina Gold Amalgamating Company, was incorporated under the laws of North Carolina, on the 30th of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing, and assaying ores and metals, with the power to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the company for \$5489, recovered in the Court of Common Pleas of Philadelphia, on the 18th of May, 1879, upon its two drafts, one dated June 1st, 1874, and the other August 15th, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them, alleging that he had frequently applied to the officers of the company to institute a suit for that purpose, but that under various pretences they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at \$100,000, divided into 1000 shares of \$100 each, with power to increase it from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might be paid "in such instalments, in such manner, and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss, or damages, or be responsible beyond the assets of the company.

Previously to the charter, the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a corporation. Upon obtaining the charter, the capital stock was paid by the property of the former association, which was estimated to be of the value of \$100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property;

¹ Citations of counsel and part of opinion omitted. — ED.

and the average estimate amounted to \$137,500. This sum they reduced to \$100,000, inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the instalments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. *Boynton v. Hatch*, 47 N. Y. 225; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Carr v. Le Fevre*, 27 Penn. St. 413.

But the allegation of intentional and fraudulent undervaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the incorporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The incorporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction.

[The learned Judge then held that the stockholders could not be called upon, by the plaintiff, to pay in the amount of a subsequent issue of stock, which was soon afterwards recalled and cancelled.]

Judgment affirmed.

IN RE H. AND M. TIN AND COPPER MINING CO.
SPARGO'S CASE.

1873. *Law Reports*, 8 *Chan. Ap.* 407.¹

APPEAL by Spargo from an order of the Vice-Warden of the Stannaries.

Michell and *Stephens* were licensees of a sett for twelve months from the 28th of January, 1871, with the right at any time within that period to call for a lease for twenty-one years. They and *Spargo* entered into arrangements for promoting a company to work this mine, and determined that its capital should be £3200, in sixty-four shares of £50 each; £16 per share to go for working capital, and £34 per share for the purchase of the mine, treating it as worth £2176. A company for that purpose was accordingly registered on the 9th of March, 1871, under the above name. The capital was stated by the memorandum of association to be £3200, in sixty-four shares of £50 each. *Spargo* subscribed the memorandum for thirty-one shares, two other persons for two shares each, and the remaining four subscribers for one share each. Neither *Michell* nor *Stephens* was a subscriber.

March 16, 1871, at a meeting at which all the seven subscribers were present, it was unanimously voted: "That the sum of £2176 be credited Mr. *Thomas Spargo* for the lease, &c., of the property, and that the same be paid out of the share capital of the company." In *Spargo's* account on the ledger of the company he was debited with the amount payable on his shares, and credited with the price of the lease (£2176), and with sundry items of cash, salaries, &c., which in the aggregate exactly balanced the sum payable on the shares.

Section 25 of the Companies Act of 1867 reads as follows: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

At a meeting of the company in September, 1871, it appeared that the lease had not yet been transferred to the company. It also appeared that, by an agreement previously entered into between *Spargo* and *Stephens* and *Michell*, *Spargo* was to receive one half the sum of £2176 for bringing out the company, the remaining half to be divided equally between *Stephens* and *Michell*. It was ultimately agreed that *Spargo* should pay £543 in cash, and transfer twenty shares to the company as a security for the transfer of the lease; the company undertaking to settle with *Stephens* and *Michell* out of the said money and shares, and to pay the balance in new shares and money to *Spargo*. *Spargo*

¹ Statement abridged. Arguments omitted. — Ed.

handed over the £543, and transferred the twenty shares. No lease, however, was ever granted, difficulties having been raised as to its form on the part of the lessees.

The company having proved a failure, an order for winding it up was obtained Dec. 21, 1871.

The Vice-Warden, upon the application of the Registrar acting as liquidator, made an order upon *Spargo* to pay £50 per share on nine shares (all that were standing in his name at the commencement of the winding up); and also to pay a balance on other shares which he had parted with. From this order, *Spargo* appealed.

Roxburgh, Q. C., and *Woodroffe*, for appellant.

Fry, Q. C., and *Joseph Dixon*, contra.

SIR W. M. JAMES, L. J. I am of opinion in this case that the order of the Vice-Warden cannot stand.

The question turns upon what is the true intent and meaning of the 25th section of the *Companies Act*, 1867, which we had to consider very fully in *Fothergill's Case*, in which judgment was delivered yesterday by the Lord Chancellor and ourselves. In that case no doubt it was not necessary for us to lay down what would amount to "payment in cash," since we were clearly of opinion that there had not been any payment of cash or anything that could be called a payment of cash in that particular case, but it was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision. The object of the section was, I apprehend, to prevent such contracts as had been before the Court in *Pellatt's Case*,¹ and *Elkington's Case*,² in which a man was to take shares, and to pay for them by supplying goods when wanted. It was considered that there was mischief in collateral contracts of that kind, which deprived creditors of the remedies which they would expect to have against persons whose names they saw registered on the list of shareholders. In *Fothergill's Case*,³ the bargain in effect was to give paid up shares in satisfaction of the money which was to be paid for other shares. But if a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's*

¹ Law Rep. 2 Ch. 527.

² Law Rep. 2 Ch. 511.

³ Law Rep. 8 Ch. 270.

Case, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash. If it came to this, that there was a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham, or evasion, or trick, to get rid of the effect of the Act of Parliament, but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present, and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case. It was argued, however, that the payment by the company was made for a consideration which has absolutely failed. If, however, the payment was made, the subsequent failure of the consideration could not prevent its being a payment, nor prevent its repayment by the shareholders from being a payment in full of the shares, though there might be an action or a bill by the company either for the return of the money or for damages, in case there was a subsequent failure to do something in respect of the property. But I see no trace whatever, no shadow of anything like what may be called a failure of consideration. What the parties were dealing with was a license or sett for a year, with a right to get a license or sett for twenty-one years. That was the property which the parties undertook to deal with. The company, with knowledge of all this, not only paid the £2176, in the manner which appears, to the Appellant, but afterwards made arrangements with him for satisfying the two other persons who were interested with him for their proportion of the property. After this disputes arose, not between this gentleman and themselves, but between the intending lessors and themselves; not as to the right of one to have the lease and the obligation of the other to grant a lease, but as to what would be the proper conveyancing language in which that lease was to be expressed. It appears to me that it would be an abuse of language to say that there was anything like a failure of consideration on the part of Mr. *Spargo*, which is to entitle the company to treat that payment as a payment never made, and to insist that the shares remain unpaid to this day. This applies to the forty-two shares as well as the nine

shares. Therefore, it is not necessary to discuss the question as to what we might do under the 101st section, if this were a case where Mr. *Spargo* had not paid up his shares, but they had been so dealt with that as between the company and the present holders they must be treated as paid up.

I am of opinion that the order of the Vice-Warden ought to be discharged with costs of the proceedings in the Vice-Warden's Court.

SIR G. MELLISH, L. J. I am of the same opinion. I gave my opinion in *Fothergill's Case*¹ yesterday, on the proper construction of the 25th section of the Act of 1867. I then stated that in my opinion, if the circumstances relied on would in an action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, this section would prevent their being a good defence; but that if they would support a plea of payment, then the 25th section did not prevent their being a good defence. In the present case, I am of opinion that if an action were brought at law for the amount originally payable on these shares, there would be a valid defence under a plea of payment. Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

HANDLEY v. STUTZ.

1891. 139 U. S. 417.²

APPEAL from U. S. Circuit Court for Middle District of Tennessee.

Bill in equity by creditors of Clifton Coal Company against the company and certain of its stockholders to compel an assessment and payment upon certain shares. The company was incorporated under the laws of Kentucky in 1883, with power to purchase, lease and operate coal mines; the stock being fixed at \$120,000, with power to increase to \$200,000 by majority vote. The original stock was taken and paid for, and the corporation began business at once.

In 1886, it was proposed to undertake the manufacture of coke. In order to obtain money for this purpose, the stockholders, on March

¹ Law Rep. 8 Ch. 270.

² Statement abridged. Part of opinion omitted. — Ed.

31, 1886; voted to issue bonds for \$50,000, secured by mortgage. The company did not succeed, at first, in selling the bonds. On May 31, 1886, at a meeting at which all the stockholders were present in person or by proxy, it was unanimously voted that the capital stock be increased to \$200,000. The company then proposed to give to purchasers of bonds \$1000 of stock as a gratuity with each \$1000 of bonds. On these terms bonds to the amount of \$45,000 were taken and paid for. Bonds for that amount were delivered to the subscribers with equal amounts of certificates of "paid-up stock," the receipts reciting that it "was issued with bonds for same amount, as per agreement." The certificates on their face recited that the shares of stock were fully paid up, and were non-assessable. Bonds for \$5000, not having been subscribed for, were left in a bank as collateral security for a loan to the company. The remaining shares of new stock (to the amount of \$30,000), which were not needed to secure subscribers to the bonds, appeared to have been distributed *pro ratâ* among the old stockholders.

At the hearing, where evidence was introduced tending to prove the foregoing facts and other facts hereinafter stated in the opinion, the Circuit Court held certain of the defendants liable to all the creditors of the company whose debts originated after the alleged increase of stock, and fixed May, 1886, as the date of such increase. As to debts contracted prior to that date, they were excluded because, as between the company and the stockholders, the latter held such stock properly, and without liability to the company, and all creditors who dealt with the company prior to such increase, and not upon the faith of such stock, had no equity to demand more than the company itself could.

Edward H. East, and *James Stuart Pileher*, for appellants.

Walter Evans, and *James R. MacFarlane*, for appellees.

BROWN, J.

So far as the question of liability to the proposed assessments is concerned, these defendants, with respect to their relations to this corporation, are divisible into two distinct classes: First, those of the original stockholders who received the \$30,000 increased stock as a gift; second, those who subscribed to the \$50,000 bonds, and received an equal amount of stock, as a bonus or inducement to make the subscription.

4. With regard to the first class, namely, the original stockholders, who voted for this increase of 800 shares, and then distributed among themselves 300 of those shares, without the shadow of right or consideration, it is difficult to see why they should not be called upon to respond for their value.

[The remainder of the opinion on this point is omitted.]

5. Somewhat different considerations apply to those who subscribed for the bonds of the company, with the understanding that they were to receive an amount of stock equal to the bonds as an additional

inducement to their subscription. The facts connected with this transaction are substantially as follows: Some three years after the company was organized it became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success, owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig iron. To embark in this, however, money was needed, and as the stock of the company was not worth more than 50 cents on the dollar, it was evident this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of \$50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and, acting upon the suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased 800 shares, 500 of which should be turned over to the subscribers to the bonds, as a bonus or an additional consideration. The evidence is uncontradicted that the bonds could not have been negotiated without the stock; that they were both sold as a whole; that the transaction was in good faith, and, considering the risk that was taken by the subscribers, the price paid for the stock and bonds was fair and reasonable. The directors appear to have done all in their power to obtain the best possible terms, and there is no imputation of unfair dealing on the part of any one connected with the transaction. At that time the mines and property of the company were in good condition, and the prospects of success were fair.

The case then resolves itself into the question whether an active corporation, or as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point. In the *Upton Cases*, arising out of the failure of the Great Western Insurance Company: in *Hotch v. Dana*, 101 U. S. 205, and in *Hawkins v. Glenn*, 131 U. S. 319, the defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not as in this case to purchase property or raise money, to add to the plant, and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In *County of Morgan v. Allen*, 103 U. S.

498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is *bona fide*, and not a mere cover for "watering" the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase.

Thus in *New Albany v. Burke*, 11 Wall. 96, a city subscribed to the stock of a railroad, and issued bonds for a part of the subscription, agreeing to issue them for the rest of it, when the road should be built to a certain point. The road relied mainly upon these bonds to raise the necessary money. The validity of the bonds being denied by taxpayers, who had filed bills to enjoin the raising of a tax to pay the interest, their value in the market was largely impaired, and it was found they could not be sold without a sacrifice. Under these circumstances the company applied to the city to pay a certain sum which had been borrowed by the road upon the pledge of the bonds already issued, with sundry other moneys, and in consideration thereof the city obtained from the company a large number of bonds which had not been negotiated, and a cancellation of the subscription. In

a suit brought by a judgment creditor to enforce the original subscription, it was held that the compromise was legal, and the payment of such subscription would not be enforced, although it subsequently turned out that the bonds were worth more than they could have been sold for. Said Mr. Justice Strong, speaking for the court: "Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction . . . was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued and others of which it was under obligation to issue, at the call of the vendor. . . . Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. . . . We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market."

So in *Coit v. Gold Amalgamating Company*, 119 U. S. 343, it was held that where the charter of a corporation authorizes the capital stock to be paid for in property and the shareholders honestly and in good faith pay for their subscriptions in property instead of money, third parties have no ground of complaint, although a gross and obvious over-valuation of such property would be strong evidence of fraud in an action by a creditor to enforce personal liability. The court held that where full-paid stock was issued for property received there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. In delivering the judgment of the court in that case at the circuit, 14 Fed. Rep. 12, Mr. Justice Bradley observed: "That trust (in favor of creditors) does not arise absolutely in every case where capital stock has been issued, and where it has been settled for by arrangement with the company. It is not as if the stockholders had given their promissory notes for the amount, these notes being in the treasury of the company; but there are often equities to which the stockholders are entitled — on which they are to stand." As one of them, he mentioned the case of stock dividends fairly made in consideration of profits earned and of accumulations of the property of the company, and observed: "It is not true that it is in the power of a creditor in every case, and in all cases, as a mere matter of right, to institute an inquiry as to the valuation of the amount of the consideration given for the stock, and disturb fair arrangements for its payment in other ways than by cash. If the stock has been fairly created and

paid for, there is an end of trusts in favor of anybody; and this does not affect the general proposition that unpaid subscriptions of stock are a trust fund to be administered for the benefit of creditors after a corporation becomes insolvent."

A case nearer in point is that of *Clark v. Bever*, ante, 96, decided at the present term of this court. In this case, a railroad company, of which defendant's intestate was president and stockholder, had a settlement with a construction company, of which defendant's intestate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it thirty-five hundred shares of its stock at 20 cents on the dollar, and the same were accepted in full satisfaction of the debt. The stock was not worth anything in the market, and was issued directly to the defendant's intestate. No other payment than the 20 per cent was ever made on account of this stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim, upon the theory that he was liable for the actual par value of such stock, whatever may have been its market value at the time it was received. It was held he could not recover. "Of course, under this view," says Mr. Justice Harlan, in delivering the opinion of the court, "every one having claims against the railway company, — even laborers and employes, — who could get nothing except stock in payment of their demands, became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although, at the time it was sought to make them liable, the corporation had ceased to exist, or its stock had remained, as it was when taken, absolutely worthless. . . . To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value — there being no statute forbidding such a transaction, — without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property."

So in *Fogg v. Blair*, ante, 118, also decided at the present term, it was held to be competent for a railroad, exercising good faith, to use its bonds or stock in payment for the construction of its road, although it could not, as against creditors or stockholders, issue its stock as fully paid without getting some fair or reasonable equivalent for it. It was there said: "What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them." It appeared in

that case that full and adequate compensation for the work done had been paid by the company in its mortgage bonds, and, as the bill contained no allegation whatever as to the real or market value of such stock, it was held that the contractors receiving this stock were not liable to creditors for its par value. It was added: "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit on the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court — assuming such facts to be true — to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized." It would seem to follow from this that if the stock had been of some value, that value, however much less than par, would have been the limit of the holder's liability.

In *Morrow v. Nashville Iron and Steel Co.*, 87 Tennessee, 262, 275, 276, the Supreme Court of Tennessee held, that a contract with a subscriber to stock of a corporation, that for every share subscribed he should receive bonds to an equal amount, secured by mortgage on the company's plant, is void as against creditors, and also between the subscriber and the corporation. But the court drew a distinction between such a case and sales of or subscription to the stock of an organized and going corporation. It said: "The necessities of the business of an organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such cases, the question of fraud aside, a purchaser would only be held for his contract price." This case from Tennessee puts as an illustration the exact case with which we are now dealing.

The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained. *Stein v. Howard*, 65 California, 616. As the company in this case found it

impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company. Our conclusion upon this branch of the ~~case~~ ~~disposes~~ of it as to those who were held liable by virtue of their subscription to the bonds.

6. We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. *First National Bank of Deadwood v. Gustin Minerva Consolidated Mining Company*, 44 N. W. Rep. 198; 2 Morawetz on Corporations, §§ 832-3; *Coit v. N. C. Gold Amalgamating Co.*, 14 Fed. Rep. 12. We also agree with him, that creditors who became such after the increase was voted in May, 1886, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been contracted. The circuit judge found in this connection that the "complainants had no knowledge or notice of the subscription paper of December 30, 1886, under which \$45,000 of the new stock was distributed to those who subscribed for bonds, nor of the distribution among the old stockholders of \$30,000 of said increased stock, nor does it affirmatively appear that they or either of them dealt with and trusted the company upon the faith of that increased stock; but the fact that the capital stock had been increased to \$200,000 was made public and was generally known." The real question in this connection is—when may it be presumed creditors trusted the corporation upon the faith of the increased stock? Obviously, when such increase was ordered. That is a fact to which publicity would naturally be given; the creditors could not be expected to know when and by whom such stock would be taken. It is true they assume the risk of the stock not being taken at all, but the moment shares are taken, they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment not only of future, but of existing creditors. It is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock, would, in a case like this, where the creditors and stockholders are both numerous, lead to inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties.

Decree reversed, and cause remanded for further proceedings in conformity with this opinion.

FULLER, C. J. (dissenting). I dissent from the conclusion of the court in respect of the stock received by the subscribers to the bonds. That stock was not paid for in money or money's worth, or issued in payment of debts due from the company, or purchased at sale upon the market. It was a mere bonus, thrown in with the bonds as furnishing the inducement to the bond subscription, of larger control over the corporation, and of possible gain without expenditure. Becoming secured creditors through the bonds, the subscribers increased their power through the stock. In my view, there was no actual payment for the stock, and to treat it as paid up, is to sanction an arrangement to relieve those who would reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure, of the enterprise.

When the capital stock of a corporation has become impaired, or the business in which it has engaged has proven so unremunerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk.

My brother LAMAR concurs with me in this dissent.

MELVIN v. LAMAR INSURANCE CO.

1875. 80 *Illinois*, 446.¹

ERROR to Superior Court of Cook County.

Bill of complaint, filed in 1873, by certain stockholders in the Lamar Insurance Company, of Chicago, on behalf of themselves and all others similarly situated, against the company, Cushman, Hardin, and others. The bill alleges that Cushman & Hardin, having subscribed for and taken 5500 shares, were afterwards improperly permitted to surrender said shares and to withdraw from the company all the assets which they had paid therefor; that, executions against the company having been returned unsatisfied, a receiver of the company has been appointed under a creditor's bill; that the terms of payment for stock, as provided by the by-laws, were 5 per cent cash and 15 per cent in three, six, and nine months, the remaining 80 per cent being included in a stock note subject to payment upon call by the directors; that the receiver, under the order of the court, has made a call of 20 per cent upon the stockholders, but that he ignored Cushman & Hardin as stockholders for 5500 shares, and their liability to refund the moneys withdrawn by them from the company. The bill prays that Cushman & Hardin be required to refund the money withdrawn by them, and that they be compelled

¹ Statement abridged. Portions of opinion omitted.—Ed.

to take the position of stockholders in respect to the 5500 shares which they surrendered.

Cushman & Hardin filed an answer.

Upon a hearing the following facts appeared :

The Lamar Insurance Company was incorporated in 1865 ; but the first stock was subscribed in 1869. Its assets being insufficient to authorize it to do business under the General Insurance Law of 1869, the State Auditor demanded, as a prerequisite to authorizing it to do business, that the company should have \$100,000 in acceptable securities and assets. In order to comply with this requirement, a written contract was entered into Sept. 17, 1869, between the company and Cushman & Hardin. By the first clause of this contract, Cushman & Hardin agreed to subscribe for and purchase 5500 shares, and to pay therefor the par value, \$550,000 ; the sum of \$110,000 to be paid in cash and in securities acceptable to the State Auditor, and the balance (80 per cent of the price) to be subject to a call of the stockholders. By a subsequent clause, it was agreed, in substance, that at the expiration of one year from date, at the election and request of Cushman & Hardin, the company should repurchase the stock from Cushman & Hardin, and should restore to them all that the company had received from them on account of the stock.

Under the above arrangement, certificates for 5500 shares were issued to Cushman & Hardin in the usual form ; and it so appeared upon the books of the company. Cushman & Hardin delivered to the company cash and acceptable securities to the amount of \$110,000. This transaction enabled the company to comply with the Auditor's demand that it should have \$100,000 ; and enabled the company to procure the Auditor's certificate and authority to do business.

The Superintendent of the Insurance Department in the office of the Auditor testified that, at that time, the president of the company and Hardin both assured him that the assets shown to him were the *bona fide* assets of the company ; that stock was issued to Cushman & Hardin in payment for the securities ; and that the certificates of stock were exhibited to him. There was also testimony that the company, in effect, represented to third persons that the assets furnished by Cushman & Hardin were part of the assets of the company and that the stock taken by Cushman & Hardin was part of the subscribed stock of the company ; and it was in evidence that some of these representations were made with the knowledge of Cushman & Hardin.

Subsequently to Sept. 17, 1869, there were subscriptions made by other persons to the stock of the company, to a very large amount.

Subsequently the stock issued to Cushman & Hardin was cancelled ; and all payments made by them therefor, either in money or securities, were repaid to them.

Upon the hearing the court below dismissed the bill.

John N. Jewett, and *Sidney Smith*, for plaintiffs in error.

Monroe, Bisbee & Ball, for defendants in error.

SHELDON, J. We have no doubt that, under the written contract of September 17, 1869, which was introduced in evidence with all its indorsements, Cushman & Hardin were actual stockholders in the Lamar Insurance Company, in respect to the 5500 shares of stock which were the subject matter of the contract, and that they did not take the shares merely as collateral security for a loan of \$110,000, in money and securities, as insisted upon in the defense, although the latter was the real transaction between the parties as intended by themselves.

This, then, is the condition of Cushman & Hardin in respect to these 5500 shares. Certificates of stock were issued to them in the usual form, and it so appeared upon the books of the company. The exhibition and representation of the certificates as *bona fide* certificates, and of the assets as *bona fide* assets, enabled the company to obtain the Auditor's certificate.

Cushman & Hardin held themselves out, and allowed others to represent them, as stockholders for that amount, or, that their stock was a part of the subscribed stock of the company. Thereafterward, subscriptions to the stock of the company were made to a large amount.

The persons thus subscribing had no reason to suspect that the stock taken by Cushman & Hardin stood upon any different footing from that which they received. They had a right to suppose that the 20 per cent upon these 5500 shares had been paid in, to remain permanent assets of the company for the payment of its debts, and that the remaining 80 per cent was, equally with the 80 per cent of the stock for which they subscribed, liable to be called in to supply any deficiency.

All subscriptions are presumably upon the same basis, and all shares entitled to the same benefits and subject to the same burdens. In the subscription of each person every other subscriber has a direct interest.

There purported here to have been a large amount of stock taken, whereas, in fact, there was really no stock taken — the issue of the shares to Cushman & Hardin being coupled with the right on their part to surrender them and take back their money. Such a private arrangement with an individual subscriber, although it may not be intended, is, in law, a fraud upon the other subscribers; and such agreement will be disregarded, and the party be held bound to all the responsibilities of a *bona fide* subscriber. This is the doctrine, as we regard, abundantly established by judicial decisions.

[The learned Judge here referred to *Blodgett v. Morrill*, 20 Vermont, 509; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124; *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. State, 334; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. State, 489; *Stanhope's Case*, L. R. 1 Chan. Ap. 161; *Mingles v. Grand C. D. Co.*, 10 Simons, 519; *Preston v. Same*, 11 Simons, 327; *Minor v. Bank of Alexandria*, 1 Peters, 65; *Hervey v. Vermilion & A. R. Co.*, 17 Ohio, 187; *Downie v. White*, 12 Wisc. 176; and *Chandler v. Brown*, 77 Ill. 335. The opinion then proceeds:]

The subscribed capital stock of a corporation, as also all its other

property, is a trust fund for the benefit of the general creditors of the corporation, and its governing officers can not, by agreement with a stockholder, release him from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing for a valuable consideration. *Sawyer v. Hoag*, 17 Wall. 620; *New Albany v. Burke*, 11 id. 106. And no more can they do so, we conceive, to the prejudice of stockholders. See, also, *Selma and Tennessee Railroad Co. v. Tipton*, 5 Ala. 787; Ang. and Ames Corp. secs. 146, 535, 600, 1 Redf. on Railways, 206.

It is insisted by counsel for defendants in error that the authorities cited are distinguishable from the present case, in that they are cases where the subscription itself was unconditional, and it was sought to be avoided by setting up a collateral agreement, either made by parol or by some other disconnected writing; whereas, here, the conditional character of the subscription appears upon the face of the subscription itself — the written contract of Sept. 17, 1869; that a party has a right to make any condition he pleases to a subscription, provided the condition is expressed in the contract; that what he is forbidden to do, is to make an unconditional subscription, accompanied by a secret stipulation, parol or written. There would be more force in this position, did the transaction rest entirely in the contract of Sept. 17, 1869. Then, the only evidence of Cushman & Hardin's connection with the stock would show that they were *only conditionally* connected with it, and it might plausibly be said that subsequent subscribers for stock could not be deceived or misled thereby. But there is more than that contract. There were certificates of stock issued in the usual form, and it so appeared upon the books of the company.

Here were the evidences of the right in the stock. They were unaccompanied by any sign of a condition. They showed the stock taken to be real, *bona fide*, absolute stock — the same as all other issues of shares of stock. It is, we think, upon these latter evidences, the certificates of stock, and the books of the company showing their issue, that others would be entitled to rely, and rest upon, as showing the character of the stock taken; and that they should not be held bound to go back and take notice of an antecedent individual contract existing between the directors of the company and the takers of the shares. This being so, there would be here the same evil — the liability to be misled and deceived by these unconditional certificates of stock, and their so appearing on the books of the company — as there is in the case where there is but a mere subscription, and the unconditional subscription is accompanied by a separate, collateral agreement qualifying it. The absolute character of the certificates of stock is sought to be qualified by a separate individual contract, in the same manner that, in the other case, an unconditional subscription of stock is attempted to be qualified by a separate collateral agreement. The qualifying agreement would seem to be of as secret a nature in the one case as the other.

We must think that this case is brought within the principle of the authorities referred to, so as to render them applicable and of controlling effect.

It is said that the subscriber to the stock of an organized company is bound to know the state of the records of the company; and that every person who subscribed here, was bound to know what this contract of September 17, 1869, was. The record book of the company was destroyed in the fire, in Chicago, of October 8 and 9, 1871. There is conflicting evidence whether the contract was spread upon the records of the company or not. But assuming that it was, it would be most unreasonable to hold that the subscribers to the stock of this insurance company, scattered abroad as they were, should be held to be bound by any presumed notice of what was being done by the directors of the company in the city of Chicago, in matters affecting their interests as such stockholders. In *Stanhope's case*, above cited, it is held that the shareholders in a company are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed, by the stockholders, to have done their duty.

It is supposed by counsel for defendants in error that it was necessary that the complainants in the court below should have made proof that they were influenced, in subscribing for the stock of this corporation, by this pretended subscription of Cushman & Hardin, and it is said they have failed in doing so.

We see no distinct proof of this. But it must be supposed that they and other subscribers were thus influenced by the amount of the subscriptions which had been made to the stock of the company, a part whereof was this large amount taken by Cushman & Hardin.

Holding, as we do, that this option to surrender these shares of stock, and take back the money and securities, was invalid, and to be disregarded as a fraud against the other stockholders, the transaction of the directors of the company in the cancellation of the stock, and repayment of the money and securities, must be held here as of no effect.

It was not an independent, fair dealing in respect to the stock for a valuable consideration, but it was action had under the contract only, and but the allowance and carrying out of the exercise of the option of the contract, and equally invalid with the option itself.

[The learned Judge then *held*, that the action of the directors in surrendering the stock was not ratified by the stockholders at the annual meeting in 1871; and also that an agreement of release subsequently executed by a committee of the stockholders could not be sustained in a court of equity, and could not be set up in discharge of the liability of the defendants. The opinion concludes thus:]

It follows, from what has been said, that this \$110,000 was wrongfully withdrawn by Cushman & Hardin from the company, and should be refunded by them; that the cancellation of the 55,000 shares of stock, issued to Cushman & Hardin, should be disregarded, and they

still be regarded as stockholders in respect to such stock; and in any assessment upon the stock of the company, those shares should be assessed equally with all the other stock. The decree, so far as respects Cushman and Hardin, will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

WINSTON v. DORSETT PIPE AND PAVING CO.

1889. 129 *Illinois*, 64.¹

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County.

G. W. & J. T. Kretzinger, and *Page & Booth*, for appellants.

Wilson & Moore, for appellee.

MAGRUDER, J. This is a bill filed by the appellant, F. H. Winston, as a stockholder in the Dorsett Pipe and Paving Company, a corporation organized under the laws of this State, against said company, and its creditors, and the other stockholders, all of whom are parties defendant to this proceeding. The bill seeks the dissolution of the corporation, the appointment of a receiver, the sale of the corporate assets, the assessment of the shareholders, and the payment of the creditors.

The company was organized in 1881 with an authorized capital of \$125,000.00, divided into shares of \$100.00 each. Among the original subscribers to the stock, who participated in the organization, were the following persons, whose subscriptions were as follows: F. H. Winston, 50 shares, \$5,000.00; Joseph Stockton, 100 shares, \$10,000.00; M. S. Chase, 100 shares, \$10,000.00; J. S. Waterman, 100 shares, \$10,000.00; J. S. Waterman, trustee, 637 shares, \$63,700.00. Waterman died before the filing of the bill, and his executors were defendants in the court below. The only appellants in this case are F. H. Winston, the complainant, and Stockton and Chase, two of the defendants. The appellees, who are chiefly interested in the controversy, are the executors of Waterman's estate. None of the creditors, and none of the stockholders, except the three appellants, complain of the decree of the Circuit Court.

The decree assesses the whole amount of indebtedness, found to be due, against all the stock, subject to assessment, except that known as the "Waterman trustee stock," amounting originally to 637 shares. It is only this feature of the decree which the appellants complain of. They claim that the trustee stock should have been made to bear its

¹ Arguments and part of opinion omitted — ED.

pro rata share of the indebtedness, and that, by the failure of the court below to assess it, along with the rest of the stock, they are compelled to contribute more than their fair proportions towards the discharge of the debts of the company.

The original subscribers to the stock, besides those already named, were D. H. Dorsett, 250 shares, \$25,000.00; I. P. Ellacott, 10 shares, \$1,000.00; F. S. Winston, Jr., 3 shares, \$300.00. After 613 of the 1250 shares had been subscribed for, there was nobody to take the remaining 637 shares. It was deemed advisable to organize the corporation at once, and to proceed with the business as soon as possible. Under the statute a certificate of organization could not be obtained from the Secretary of State until the capital stock should be fully subscribed. Accordingly it was suggested, at the gathering of the original subscribers above named, and while they were engaged in signing their names to the subscription paper, that Waterman, who was the prime mover and chief promoter of the scheme, should subscribe for the 637 shares, as trustee. In pursuance of this suggestion he signed the list: "J. S. Waterman, trustee, 637 shares, \$63,700." The caption of the paper, so signed by him and the others, is as follows: "We, the undersigned, hereby severally subscribe, for the number of shares set opposite our respective names, to the capital stock of the Dorsett Pipe and Paving Company, and we severally agree to pay the said company for each share the sum of one hundred dollars."

There is some uncertainty expressed by some of the witnesses as to the persons for whom Waterman was acting as trustee when he so signed his name. We deem it unnecessary to consider whether he was technically a trustee for the corporation, or for the stockholders, or for the future distributees of the stock. After a careful examination of all the evidence, we are satisfied that there was a definite understanding between him and the other subscribers as to the purpose for which he took the stock, and as to the nature of the liability which he assumed thereby. It was understood that, after the report should be made to the Secretary of State, and the complete organization of the corporation should be effected, Waterman should go to work to dispose of the stock to third parties, and that the other stockholders should help him to so dispose of it. As between him and his co-stockholders, he was not to be liable upon the stock, and was not to be required to pay assessments upon it. It was explained to him, and he was fully aware, that, as between him and creditors of the company, he would be held liable upon his subscription for the 637 shares.

As between the State and Waterman, he must be regarded as a subscriber for the 637 shares. If he and those associated with him reported a fictitious or unreal subscription for the trustee stock, they obtained a charter from the State by fraud. There is no evidence of any such intention or design on the part of the gentlemen who organized this corporation.

As between the creditors of the company and Waterman, he must be regarded as a subscriber for the 637 shares. The fact that he placed the word "trustee" after his name would make no difference in his liability to the creditors. "Where shares are held by a person as trustee for another, the legal holder of the shares, and not the equitable owner, is primarily liable both to the company and to its creditors." (2 Morawetz on Corp. sec. 853.) Appellees admit that the estate of Waterman is liable to be assessed upon the shares held by him as trustee, if such assessment becomes necessary in order to pay the debts of the corporation. The rights of the creditors in this regard are recognized by the decree of the trial court.

But, in view of the understanding among the stockholders that the trustee stock should not be subject to assessment as between Waterman and the original subscribers, the Circuit Court, by its decree, makes an assessment against the stock, other than the trustee stock, reserving the right to make further assessments if the same shall be needed. The decree provides that "in case money enough cannot be realized from the assessments upon the stock, which is liable to contribute to, and be assessed as aforesaid for, the payment of the valid debts and obligations of the said corporation, then the said executors of said James S. Waterman, deceased, shall be required to pay also upon the said stock taken by James S. Waterman, as trustee, such sum as may be necessary to pay said deficiency." The executors are assessed upon the \$10,000.00 of stock subscribed for by Waterman individually.

We cannot see why, under the facts disclosed by this record, the decree of the court below is erroneous in holding, that the trustee stock should not be assessed primarily, and in the first instance, as between these three appellants and the Waterman estate. The decree does not require the appellants to pay more than they owe. Neither of them ever paid his subscription to the capital stock in full. Unpaid subscriptions to the capital stock of a corporation constitute a trust fund, which may be subjected to the payment of the debts, like any other asset. The assessments made by the present decree against the appellants respectively do not exceed, or equal, the several amounts due from them upon their unpaid subscriptions. There is no hardship in requiring them to carry out the arrangement as to the trustee stock, made with Waterman in their presence, and with their consent, and of which they reaped the benefit by a speedy organization of the Pipe and Paving Company.

In most of the cases, where subscriptions to the capital stock of corporations have been condemned as being conditional, or accompanied by secret or qualifying agreements, the rights of creditors or stockholders have been prejudiced. Creditors are entitled to look to the stock as it appears upon the face of the subscription list. Each stockholder has a vested right in the contract for subscription of every other stockholder. In the case at bar, no creditor is injured, and no creditor

is complaining. The appellant stockholders cannot object to the release of stock which they permitted to be subscribed for with the understanding that, so far as they themselves were concerned, it should be released. We are of the opinion that the Appellate Court committed no error in affirming the decree of the Circuit Court.

The judgment of the Appellate Court is, therefore, affirmed.

Judgment affirmed.

IN RE RAILWAY TIME TABLES PUBLISHING COMPANY.

EX PARTE WELTON.

1894. *L. R.* (1895), 1 *Chancery*, 255.¹

SUMMONS by the liquidator of this company for a call of £2 5s. per share upon shares of which Mr. *T. A. Welton* was the holder.

The company was registered in January, 1886, with limited liability, the capital being 30,000, divided into 6000 shares of £5, with power to increase.

The articles of association contained the following clauses : —

(4.) “The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times as the directors think fit, and either at a discount, premium, or otherwise.”

(41.) “The company may, from time to time, increase the capital by the creation of new shares of such amount as may be deemed expedient.”

(42.) “The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto, as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of assets of the company, and with a special, or without any, right of voting.”

(140.) “If the company should be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions.”

The whole of the 6000 shares, except ten, were allotted as fully paid up to the vendor to the company of the property and business which the company was formed to acquire.

¹ The opinions and argument in the Court of Appeal are omitted. — ED.

In June, 1886, a special resolution was passed to increase the capital of the company by the creation of 2000 new shares of £5 each. Of these shares 600 were issued as "bonus" shares, upon which nothing was paid, and 900 were issued at a discount of £4 10s. per share, that is, only 10s. per share was paid for them. In December, 1886, another special resolution was passed to increase the capital by the creation of 5000 additional shares of £5 each. These shares were all issued at a discount of £4 10s. per share. Mr. *Welton* was the holder of some of the discount shares. In the winding-up of the company he was placed on the list of contributories in respect of those shares, and a call of £2 5s. per share was made upon him and the other holders of discount shares for the purpose of paying the debts of the company and the costs of the winding-up. Mr. *Welton* did not dispute his liability in this respect.

The liquidator now sought to make a further call of £2 5s. per share on the discount shares, for the purpose of adjusting the rights of the contributories *inter se*. Mr. *Welton* disputed his liability to a call for this purpose, and the hearing of the liquidator's summons was adjourned into Court. The summons was heard before Mr. Justice *Kekewich* on the 7th of August, 1894.

Renshaw, Q. C., and *Whinney*, for the liquidator, in support of the summons:—

The holders of shares issued at a discount are liable in the winding-up of the company to pay or contribute the unpaid part of the nominal value of their shares, and this liability exists, not only as between such shareholders and the creditors of the company, but also as between such shareholders and their fellow-shareholders. The question of the extent of the liability was considered by Lord *Herschell* in *Ooregum Gold Mining Company of India v. Roper*.¹ That was not the case of a winding-up, but of a going concern; and the only point really decided in that case was that the issuing of shares at a discount was illegal, at all events to the extent to which the unpaid part of the nominal value of the shares was required for the payment of debts. Lord *Herschell*, however, at the end of his speech on p. 143 of the report, appears to have intimated that the liability extended no further; and if that is so, *Welton* in the present case would not be liable to pay or contribute anything in respect of the discount shares beyond what was necessary for payment of the debts and the costs of the winding-up. But the observation of Lord *Herschell* was obviously made *obiter*, and not after argument; and Lord *Halsbury*,² guarded the House from the adoption of it. The weight of authority is clearly the other way. One of the earliest cases is *In re Anglesea Colliery Company*,³ where it was held that a holder of fully paid-up shares is a "contributory," and that a call could be made upon partly paid-up shareholders for the purpose of adjusting the rights between them and the fully paid-up

¹ [1892] A. C. 125.

² *Ibid.* 149.

³ Law Rep. 2 Eq. 379; 1 Ch. 555.

shareholders. The judgment of the Master of the Rolls (Sir *George Jessel*) in *Burgess's Case*¹ shews that a shareholder, to relieve himself of any part of the liability to contribute imposed by sect. 38 of the *Companies Act*, 1862, must establish the existence of some right as between him and his fellow-shareholders which precludes them from compelling him to make payment of calls. See also *In re Provision Merchants' Company*,² where a call was made for the equalization of shares notwithstanding an alleged understanding that no call should be made except in case of insufficiency of the assets to discharge debts; and see *Buckley on Companies*.³ But in truth the matter is concluded by the case of *In re Weymouth and Channel Islands Steam Packet Company*,⁴ where the Court of Appeal (affirming the decision of Mr. Justice *North*) held that, as between discount shareholders and ordinary shareholders, there was no contract express or implied that in the event of debts being satisfied the discount shareholders should have any preference. The *dictum* of Lord *Herschell* in *Oregon Gold Mining Company of India v. Roper*⁵ must be read subject to the provision of sect. 25 of the *Companies Act*, 1867, that every share shall "be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." The result of the authorities is that, under sect. 38 of the *Companies Act*, 1862, and sect. 25 of the *Companies Act*, 1867, the holder of a share is, on the winding-up of the company, liable to pay up the nominal amount in full, unless he can shew that there is some right or equity which cuts down that liability. Such a right or equity must depend either on contract or estoppel. Here, there was no contract between the discount shareholders and the other shareholders: the only contract was between the discount shareholders and the company for the issue of shares at a discount; and that contract was illegal, and knowledge of the illegality must be imputed to the discount shareholders. Nor was there any estoppel, for that only arises when something is said contrary to the truth, and the resolution for the issue of the discount shares did not contain or involve any such statement. There is nothing special in this case. The provisions of art. 140 of the articles of association cannot override the express provision in sect. 38 of the *Companies Act*, 1862.

John Chester, for a shareholder, referred to *In re Wakefield Rolling Stock Company*.⁶

Eve, for Mr. *Welton*, contended that it was *intra vires* of the members of a company to come to an agreement between themselves, throwing a greater burden on one class of shareholders to the relief of another, subject always to the paramount rights of creditors. It was in substance a contract between partners, their rights under which the Court would enforce as between themselves. [He cited *Maxwell's*

¹ 15 Ch. D. 507.

² 6th Ed. pp. 293, 294.

³ [1892] A. C. 125.

² 26 L. T. (N. S.) 862.

⁴ [1891] 1 Ch. 66.

⁵ [1892] 3 Ch. 165.

Case,¹ *McKewan's Case*,² and the *Companies Act*, 1862, ss. 14, 16, 18, 23, 25, 38, sub-ss. 4 and 6, 74, 109, and 133.]

KEKEWICH J. : —

Whether a case of this kind is likely to occur again frequently or not, there is no doubt that it is one of considerable importance ; and I apprehend that the strength of Mr. *Eve's* position, and the strength also of his argument, and certainly the difficulty of the case, depend upon what was said by the present Lord Chancellor in *Ooregum Gold Mining Company of India v. Roper*.³ It is not pretended that what fell from Lord *Herschell* in that case was in any way necessary to the decision of the point before the House, and to that extent what his Lordship said may fairly come within the class of *obiter dicta* ; but, of course, anything said by Lord *Herschell* as a Judge, irrespective of his present position, deserves the very greatest respect from me ; and, more than that, anything said by any member of the ultimate Court of Appeal must be regarded with scrupulous care. I need scarcely add that I entertain a considerable amount of diffidence in not being able to follow the reasoning of Lord *Herschell* in that case ; but I think it is right, having regard to his position and the place where the words were uttered, to express my reasons as clearly as I can.

Mr. *Welton*, represented by Mr. *Eve*, accepted shares in this company that were issued at a discount. I will take these shares as a sample, because, although there are other classes of shares, such as bonus shares and others, respecting which the argument has arisen, what is true of the discount shares will at least be true of the other shares in equal degree. Mr. *Welton* has been held to be a contributory as regards those shares for the whole amount unpaid in cash, according to the 25th section of the *Companies Act*, 1867, and in that decision he has acquiesced. But he says that all he is required to do is to contribute to the claims of creditors and the costs of winding up, and that when the stage which has now been reached has been arrived at — that of adjusting the rights of contributories among themselves — then he is not liable, because there was what he has called, and I will venture to call also, a “contract” between him and the other contributories that these shares should be issued, not as carrying the liability to pay the full amount in cash, but as carrying a lesser liability ; and that the other contributories cannot, now it has come to a question of the rights of the contributories *inter se*, insist on his paying the full amount in cash. I use the word “contract” as it has been used in argument for such an arrangement, and because I know of no other word which will fit the case, and I avoid the use of the word “*quasi-contract*” ; but really, to my mind, the question is whether there is, in any strict sense of the word, a contract at all.

There is no occasion to go through the sections of the Act of Parliament, though it was perhaps necessary for counsel to call my attention to them, because it is conceded that there is the liability of ordinary

¹ Law Rep. 20 Eq. 585.

² 6 Ch. D. 447, 458.

³ [1892] A. C. 125.

shareholders not only to contribute to debts and costs, but also to the adjustment of rights *inter se*. All that is said is that these provisions are not applicable to this particular case because of the contract to which I have just referred.

Now, under what circumstances is the contract entered into? The shareholders in general meeting—and I will assume for this purpose all the shareholders, without stopping to consider how many were present, and how many voted by proxy or otherwise—agree that these shares shall be issued at a discount: of course, that was not so in so many words; but I wish to put the case as strongly as I can. The 25th section of the Act of 1867 says: “Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing,” which was not done here. It has now been held and finally settled, in the case of *In re Almada and Tirito Company*,¹ that any resolution of that kind is *ultra vires*, that it is not within the powers of the company, even by unanimous resolution, to issue shares at a discount; and in that sense—in the sense in which it is *ultra vires*—it may be said that the shareholders could not in general meeting, even if they were all present, so ratify a contract of that kind as to make it binding on the company. That is, I apprehend, the meaning of *ultra vires* the company. That might still leave it open to the shareholders to take the burden on themselves individually—to debar them from saying that it is not binding on them individually. But, surely, their issuing shares at a discount is something more than *ultra vires* the company. In some of the cases on the point that is called “illegal.” In one case it is called “not legal.” There may be some difficulty in determining what is the precise epithet by which to style the issue of shares at a discount which is forbidden (so the Court of Appeal has held) by statute; but at any rate you come to this, that it is forbidden by statute: it is illegal at any rate in this sense, that the law says it shall not be. Is it possible to have a contract which the law says shall not be entered into? Mr. *Eve* says, “Yes, you can have a contract between the parties, though it is not a contract to which the company is a party:” but, to my mind at any rate, there is great difficulty in principle in saying that a contract which the statute has forbidden, and says shall not be, can take place in one way more than another. That, I think, is concluded by authority. I have before me a reported decision of Mr. Justice *Stirling* in this very company, but before the winding-up: *In re Railway Time Tables Publishing Company, Ex parte Sandys*.² He quotes³ the judgment of Lord Justice *Cotton* in *In re Almada and Tirito Company*, and then says: “The Lord Justice *Cotton* held that the contract in that case, which was substantially the same as the one I have to consider in the present case, was beyond the powers of the company to enter into. Lord Justice *Fry* and Lord Justice *Lopes*

¹ 38 Ch. D. 415.

² 42 Ch. D. 98.

³ 42 Ch. D. 104.

expressed an agreement in general terms with the reasons of Lord Justice *Cotton*. Certainly they expressed no dissent whatever from that position. Then if the contract be *ultra vires* of the company it is not merely voidable, but it is absolutely void, and as Lord *Cairns* said in a well-known case it is incapable of being ratified by the whole of the shareholders of the company even if they were assembled in one room and voted to that effect." Having regard to the language of that learned judge there, I do not think he was directing his attention to a contract merely *ultra vires* the company, and which might be a contract good as between the shareholders, but what he says is possibly open to that distinction.

But what was said in *In re Weymouth and Channel Islands Steam Packet Company*¹ does not seem to be open to any such remark. Mr. Justice *North* says:² "Mr. *Cozens-Hardy's* principal argument was this, that, although no doubt what was done was illegal" — that was an issue of shares at a discount — "as between the creditors and the contributories of the company, yet it was perfectly open to all the contributories to make such an agreement *inter se*, and that there is sufficient evidence that this was really done. If all the shareholders had been present in the same room, and had all agreed to it, there was nothing illegal in the bargain — nothing to incapacitate them from contracting to that effect; and Mr. *Hardy* says it must be taken as between the shareholders (the creditors being got rid of) that the assent of all was actually given. Mr. *Hardy* referred to one or two cases as tending in that direction; but I do not think they go further than that. I feel great difficulty in seeing how it would be possible to say that all the shareholders were bound." That case came on before the Court of Appeal, who agreed with Mr. Justice *North*.³

¹ [1891] 1 Ch. 66.

² [1891] 1 Ch. 75.

³ In that case *LINDLEY*, L. J. said: "The first question we have to consider is, what is the effect of that transaction — what contract was, in fact, entered into by those who took shares upon the terms of the resolutions to which I have referred? I take it to be clear beyond all controversy that the contract, and the only contract, into which they entered was a contract with the company. There was no contract with the individual shareholders, as distinct from the company; such a contract was never dreamt of; and it would be contrary to principle to hold that a contract with a corporation is equivalent to a contract with the individual members of that corporation. Mr. *Buckley* felt that difficulty, and under the stress of it he was compelled to contend that a contract with a corporation might, for certain purposes at all events, be treated as a contract with individual members. That is contrary to law, and contrary to all the principles which relate to contracts with incorporated societies."

In the same case, *BOWEN*, L. J., said: "Mr. *Buckley's* whole case depended on his laying the foundation of a contract between the individuals. The answer is manifold. In the first place, as my brother *Lindley* has observed, there was no contract in fact between those individuals; secondly, the law would not, under the circumstances of the case, imply any such contract; nor would it imply a contract except under circumstances which are consistent with the hypothesis of an implied contract. Thirdly, if there was a contract as between the individuals as suggested — and suggested without reason — it can only be a contract between the individuals that each should make an illegal contract with the company — a contract with the company which is *ultra vires*

[The learned Judge here quoted the last two sentences in the opinion of Lord Justice *Bowen*, given in the note.]

That seems to me to conclude the point which has been argued here. To my mind, it being once decided that the issue of shares at a discount is illegal, in the sense of being forbidden by statute, the result is that the issue can confer no rights at all, and the agreement of parties confers no rights on themselves *inter se*.

I approach what Lord *Herschell* says from that point of view. Now, the first remark I make is that it was not necessary for the decision of the case before the House. Lord *Watson* said¹ that he had had an opportunity of considering the suggestions to be made by Lord *Herschell*, and agreed with him; but his agreement was based on sect. 5 of the *Companies Act*, 1879, to which Lord *Herschell* does not refer. Then, before turning to Lord *Herschell's* own language, I observe that Lord *Macnaghten*, who also addressed the House at considerable length, and Lord *Morris*, who expressed a shorter opinion, do not allude to this point at all; and ultimately Lord *Halsbury*, being then Lord Chancellor, says this:² "My Lords, before putting the question, I only desire to add that I have designedly avoided alluding to the point which has been mentioned by my noble and learned friend, Lord *Herschell*, inasmuch as it was neither insisted upon nor argued at the Bar." Lord *Herschell's* remarks, so far as they are directly in point here, are prefaced by these words:³ "Except when the Legislature has expressly or by implication forbidden any act to be done by a company, their rights," and so forth; and this conclusion is governed by that preliminary observation from first to last.

It would not be agreeable to me, and I do not think it would be right, that I should criticise Lord *Herschell's* language. Probably he had not before him at the moment the question of the issue of shares at a discount, as now regarded by the practice of the Court. I cannot think he meant to say decisively and judicially that in such a case the Legislature had not expressly or by implication forbidden that act to be done; and, though treating what falls from him, as I have already said, with the greatest possible respect, I do not think his *dictum* is binding on me; so that I am bound to exercise my own judgment to the best of my ability, and I must treat it as not governing this case. I must follow authorities which I consider binding, and which agree with my own view, and hold that Mr. *Welton* is liable to contribute, not only to the debts and costs, but also to the adjustment of the rights of contributories *inter se*.

[Mr. *Welton* appealed. The Court of Appeal, LORD HALSBURY, LINDLEY, L. J., and SMITH, L. J., dismissed the appeal. The report of the case in that Court is here omitted.]

of the company. Such an agreement, if made, could not be enforced against present, and certainly would not bind future, shareholders." — ED.

¹ [1892] A. C. 138.

² [1892] A. C. 149.

³ [1892] A. C. 143.

HUDDERSFIELD CANAL CO. v. BUCKLEY.

1796. 7 Term Reports (*Durnford & East*), 36.¹

ACTION on the case against an original subscriber to recover various calls. All but one of the calls were made after the defendant had parted with his stock.

At the Assizes a verdict was given for plaintiff, subject to the opinion of the Court on a case stated, the material part of which is as follows :

By the act of incorporation, shares of £100 each shall be vested in the persons subscribing, and their executors, administrators, and assigns ; proprietors may sell shares ; an entry of the assignment of shares is to be made in the company's books ; and after such assignment the purchasers are to have shares in the profits and to be entitled to vote as proprietors. No share is to be sold after the call of any money until such money is paid.

The first call sued for was a call for £10, made July 11, 1794 ; £8 thereof not being payable until November, 1794, and February, 1795. On Aug. 6, 1794, the defendant sold five shares to Kelsall at a profit, and transferred his interest therein to Kelsall by a proper transfer, registered by the company's clerk. On Dec. 4, 1794, entries were made in the company's books, debiting the defendant with the full amount of his subscription, and crediting him with the same amount by transfer to Kelsall.

Defendant had paid the first proportion of the first call, being £2 per share ; and the remainder of that call, £8 on five shares, amounting to £40, he paid into court on the first count.

The other calls sued for were made in 1795.

Topping, for plaintiffs.

Yates, *contra*.

LORD KENYON, C. J. [Omitting opinion on other points.] But the last point is equally clear against the plaintiffs. And not entertaining any doubt upon it, as it is a matter of infinite moment to the great mass of property embarked in this kind of speculation, I think we ought not to order a second argument lest an idea should go abroad that we have any doubts. On looking through the act of parliament, it is clear that the Legislature meant that the parties should only be liable to the payment of their shares so long as they individually continue members of this Company, that is, so long as they have property which constitutes them such. The persons, who have the right of voting, are to vote in respect of their shares. The act also says that persons who have subscribed and *their assigns* shall be deemed proprietors : but it would be

¹ Arguments omitted. Only so much is given of the case and opinions as relates to a single point. — Ed.

ridiculous to determine that a person, after he has sold his shares in respect of possessing which only he became a proprietor, should still continue to be a proprietor. After assignment the assignees hold the shares on the same conditions, and are subject to the same rules and orders, as the original subscribers, and are to all intents and purposes substituted in the places of the original subscribers. One reason however now urged why the original subscribers should always continue responsible is, because perhaps the shares may be assigned to insolvent persons: but the Legislature, when they gave their sanction to this undertaking, did not suppose that it was a mere *South-sea* scheme; they thought it a beneficial undertaking for the public, and conceived they had introduced a sufficient check by enacting that, if the subscribers did not pay their money from time to time as they should be required by the committee, they should forfeit their respective shares; and that no subscriber should part with his share while he was in arrear to the Company. No mischief therefore is likely to ensue either to the Company or the public from this construction of the act. I think that every clause in the act of parliament leads to this conclusion, that the persons liable to the calls are those only who continue to be at the time when the calls are made members of this corporation. Here the defendant had assigned his shares, and that assignment had been entered in the Company's books, before the calls stated in the three last counts of the declaration were made, and therefore he is not liable to pay them: but he is liable for the calls stated in the first count, and not having paid them at the time, and the jury having given interest on them by way of damages, the plaintiffs are entitled to that last sum on the first count, the money paid into court on that count only covering the principal sum.

ASHHURST, J. There is no doubt respecting the principal question. The original subscribers have power to assign their shares to whomsoever they please: then it would be strange to say that after disposing of their shares they should still continue liable to all the burdens which are thrown on the owners of this property. The point however does not rest on general reasoning; for the only restriction imposed by the act on the power of alienation is that the owners shall not assign until all the money due at the time of assigning is paid: but in all other cases the subscribers may assign their shares, and discharge themselves from their liability to future calls by the assignment.

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STEACY v. LITTLE ROCK & FORT SMITH R. R. CO.

1879. 5 *Dillon U. S. Circuit Court*, 348.¹

BILL IN EQUITY, by judgment creditors of the Little Rock & Fort Smith R. R. Company, against the company, and Atkins and Converse *et als.*, stockholders in the company; alleging, among other things, that Atkins and Converse are holders of unpaid stock, and seeking to compel them to pay the full par value of the stock. It appeared that the stock in question was originally issued by the company to Warren Fisher, Jr., the contractor for building the road. The charter gave the directors power to contract for work, labor, or materials, and to agree that the whole or any part thereof should be payable in the capital stock of the company. The directors made a contract, the validity of which is not disputed, to pay Fisher in bonds and stock of the company. By vote of the directors, bonds and stock were issued to Fisher in payment for work done; and by similar authority other stock was issued to Fisher in advance of being earned. Fisher did not complete his contract, and the road is now insolvent. It was alleged that he had received in bonds more than enough to pay for all he did under the contract. The stock which was issued as having been earned under the contract, and that which was issued in advance of being earned, were both in the same form, and alike purported to be paid-up stock.

The defendants, Atkins and Converse, never made an original subscription to the stock of the company, and they became holders of its shares by the purchase of the same in Boston, through brokers in the market, without any actual knowledge of the facts connected with its issue. The shares thus purchased by the defendants, Atkins and Converse, were shares which had been issued to Fisher by the company, under the resolutions and circumstances hereinbefore set forth; but whether these shares were shares which had been fully earned by Fisher, or shares which had been advanced to him in anticipation of work to be done, does not appear, nor is it possible, as counsel concede, ever to ascertain.

W. H. Winfield, B. F. Rice, M. L. Rice, and Thoroughman, for plaintiffs.

C. W. Huntington, for Atkins and Converse.

U. M. Rose, for other defendants.

DILLON, J. The ground of liability on the part of the defendants, Atkins and Converse, is that, in point of fact, none of the shares issued to Fisher were ever paid for; that he had received in bonds more in value than the work he performed under his contract was worth; that, not having complied with his contract, his agreement, contained in his construction contract with the company, to take the shares, must now

¹ Statement abridged. — Ed.

be regarded and treated as an agreement to pay for the shares in cash; and that shares, not being negotiable in the sense of the law merchant, are open, in the hands of every holder, to all the equities which attach to them in the hands of the original taker; and, therefore, since Fisher, if he held the shares, could be compelled to pay for them by the company, or at all events, by its creditors, the present holders of such shares, although they are holders for value, and without actual notice of the equities in respect thereto as between Fisher and the company, are necessarily charged with the obligations which attach to the original subscriber or holder of the shares.

There is no allegation in the bills of complaint that the defendants, Atkins and Converse, were in any way interested in, or parties to, the contracts under which said shares of stock were issued, or that they had any knowledge of such contracts when they purchased their shares of stock. Neither is there any allegation in the bills of complaint that said defendants were parties or privies to any over-issue or over-payment of bonds or stock by said company to Fisher, Jr., or that the defendants had any knowledge or information that such alleged over-issues or over-payments had been made. Neither is there any allegation that the defendants had any knowledge or information that the shares of stock owned by them had not been paid for in full, or that they had any knowledge or information that their certificates of stock were issued in fraud of the rights of creditors.

Upon the allegations of the plaintiffs' bills, as well as upon the proofs, these defendants are to be treated as the *bona fide* purchasers and holders of the shares of stock by them severally owned.

The plaintiffs nowhere allege, indeed, that any shares of stock were issued to said Fisher, Jr., by said corporation, otherwise than in accordance with the terms of said contract, or that any shares were issued in excess of the stipulations of said contract.

It is our judgment, especially in view of the provisions of sections 17, 19, and 29 of the company's charter, before adverted to, that shares of stock issued as full-paid shares by authority of the board of directors, under the construction contract, which was never questioned by the company or its shareholders or creditors, and which is not assailed or impeached by the pleadings in the cause, and sold by the contractor as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, if any there be, cannot be held subject to such equities, and to a liability to have shares thus issued and thus purchased treated as unpaid stock. No case holding such a doctrine was referred to by the learned counsel for the complainants, and it is confidently believed that no such judgment has ever been pronounced. It is difficult to perceive any principle of reason or law on which such a judgment could rest. The company have the power to issue its shares. It cannot, without special authority from the Legislature, issue its shares as full-paid without actual payment in money, or, at least, in money's worth. A leading object of the

creation of corporations and the issue of shares is that the shares may be transferred with all practicable facility. *Bank v. Lanier* (11 Wall. 369); *New York, etc. Railroad Co. v. Schuyler* (34 N. Y. 30, 82).

The company's directors and officers are the guardians of the company's rights. They ought not to issue shares in violation of their duty. They know whether the shares have been paid for or not. This the public have no means of knowing, and no effectual means for ascertaining. If the company's directors, or other authorized officers, commit a fraud upon the company in this respect, they are undoubtedly liable therefor. But can any one point out wherein the equities of the creditor of a company thus defrauded by its officers is superior to the equities of those who have acted upon the representations of such officers within the scope of their powers, accredited by resolutions of the directors and authenticated by the corporate seal, and upon such solemn assurances purchased the shares of the company? Grant that the capital stock is a trust fund for the benefit of creditors, yet this trust cannot be followed, any more than other trusts, into the hands of *bona fide* purchasers for value. Per SWAYNE, J., in *Sanger v. Upton* (91 U. S. 56, 60).

What contract did the defendants Atkins and Converse make? They made a contract to buy, and did buy, what the company had issued and represented to be full-paid shares, without notice that this representation was untrue. If the representation thus made is true, they are under no liability again to pay for the shares. If the shares had been represented to have been unpaid, *non constat* that they would have purchased them. Clearly the company would be estopped to make the claim here advanced by its creditors.

Again, we ask, in what consists the superior equity of the creditor over the obvious equities which exist in favor of such a purchaser of the company's shares. The creditor trusted that the company's officers would not violate their duty; the purchaser trusted that they had not violated their duty.

The rights and obligations of a *bona fide* transferee of shares purporting to be full-paid shares are different from the rights and obligations of the transferee of shares which do not purport to be full-paid. In cases where the certificates show on their face that the shares have been paid in part only, the law implies a promise by the transferee to pay the balance due upon the shares upon calls when he has come into privity with the company. *Webster v. Upton* (91 U. S. 65, 69); *Upton v. Tribilcock* (Ib. 45). Such an implied promise rests upon the reasonable and obvious ground that the transferee has knowingly and voluntarily assumed the liability of the transferor. But upon what ground can the law raise a promise to pay the balance due upon shares when the company has asserted, and the purchaser acts upon the assurance, that the shares have been fully paid?

The question here urged by the complainants is settled by the universal practice of business men, as well as by the judgments of the

courts. Millions of dollars of stocks are sold in this country every week, and there is no practice on the part of purchasers, and no understanding that the law requires of them, that they shall ascertain *aliunde* the representations of the company's authorized officers that certificates of full-paid stock have in fact been fully paid. How could a purchaser ascertain this fact? Must he go to the records of the particular corporation, in a remote and distant State it may be, and make an examination before he can safely buy? What more value is to be placed upon facts stated in the records than upon those stated under the corporate seal, by the authorized officers, as respects matters *intra vires*? Officers who would state a falsehood on the certificate of stock would state it on the corporate records, if this were necessary to make the intended fraud effectual. And, hence, the duty so much insisted on in argument, that a purchaser is bound to know the facts appearing on the corporate records, in addition to its being an impracticable duty, would, if discharged, be valueless as a guaranty against frauds upon creditors. Besides, on what principle is it that a purchaser of the company's shares is to be held to be the guardian of the rights of the company's creditors and bound to protect them? But the exigencies of this case do not require us to go so far, since, if we concede that a *bona fide* transferee for value of full-paid shares is charged with knowledge of all the facts concerning those shares appearing on the records of the corporation, there is nothing therein disclosed which shows that the shares purchased by Atkins and Converse had not been paid for by Fisher under his contract. The company's records show that a large amount of stock had been earned by Fisher and ordered to be issued, and under the 29th section of the charter other stock was ordered to be advanced to him, on his giving bond to the company to pay for the same under his construction contract, the validity of which was not questioned by the company or any of its shareholders.

But the question here presented does not rest alone upon general reasoning. The subject was somewhat considered by the circuit court for the eastern district of Missouri, in *Phelan v. Hazard* (Cent. Law Jour. Feb. 8, 1878, p. 109; *ante*, 45). That was a suit brought by a single creditor of an insolvent corporation to enforce the liability of a stockholder for the unpaid balance of his stock. The shares had been issued in payment for a mining property which the corporation had purchased. The plaintiff did not undertake to impeach as fraudulent this transaction between the corporation and the original shareholders, but simply claimed that the shares of stock had not been paid for, either by the person to whom they were originally issued or by the defendant, the transferee and present holder of the shares. The court, after stating that the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz., by a conveyance of the mining property of the corporation, and that the conveyance had been received and recorded by the corporation, says: "Unless this agreement is rescinded or set aside for fraud,

how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation, which showed the shares to have been fully paid for, and the manner in which the payment had been made."

Subsequently the similar case of *Foreman, Assignee, etc. v. Bigelow et al.* (Cent. Law Jour. Nov. 29, 1878, p. 430) came before the circuit court for Massachusetts, and it was decided that a *bona fide* purchaser of full-paid shares was not liable to be assessed upon his shares. The opinion of Mr. Justice Clifford is very full, and we forbear going over ground so exhaustively covered in his judgment.

A long line of English cases under the Companies Acts, referred to in the opinions in the two American cases last cited, had established the principle that stock need not necessarily be paid for in cash, — that it might be paid for in money's worth. This doctrine had led to such abuses as to cause Parliament to insert in the Companies Act of 1867 the following provision:—

"SECT. 25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares."

The construction and effect of this section came before the court in *Nichols' Case* (Law Rep. 7 Ch. 533). In that case a company issued certificates of shares as fully paid up, when in fact no payment had been made, nor contract registered under the provisions of the Companies Act of 1867, section 25. At the date of the winding up of the company some of these shares were held by N., who had no notice that they were not fully paid up. It was held (reversing the decision of Hall, vice-chancellor) that by the issue of the certificates the company were estopped from alleging that the shares were not paid up, and that N. could not be placed on the list of contributories in respect of them as unpaid shares.

An appeal was taken by the liquidator, and the appeal was dismissed by the House of Lords (26 W. R. 819). In giving judgment, Lord CAIRNS, after quoting the aforementioned section 25 of the Act of 1867, said: "The effect of the section is very simple. Before the passing of the act it was open to any holder of shares to say, 'I have made a contract that I shall not be called on to pay up the value of these shares;' but the abuse of such contracts led to a statutory provision, making it a condition that no shares be treated as fully paid unless their value is paid in cash, or unless publicity is insured by a

written contract duly filed in the manner provided for. If Goulton had been called upon to pay up the value of his shares, this section would have deprived him of any defence; but we have now to consider the case of a *bona fide* transfer for value, and I want to know how the section can affect such a transaction. It leaves untouched the question of payment, and says nothing as to evidence of payment; but if the company gives a receipt for the amount of the shares, and this receipt passes to a purchaser who does not know that no actual payment has been made, his title must not be prejudiced by the statute. He receives a representation to the effect that the law has been complied with, and it would paralyze the whole trade in companies' shares if a person taking shares with a representation that they are fully paid up must disregard this assertion and satisfy himself of the fact by personal inquiry, especially as he might have considerable difficulty in obtaining accurate information as to the fact of payment or non-payment. Much was said as to the burden of proof and as to the necessity for showing an absence of notice. If the shares come, in the regular course of business, into the hands of a purchaser for valuable consideration, those who challenge the transaction must prove that such purchaser had notice of the fact." Lords HATHERLEY, SELBOURNE, and BLACKBURN each gave opinions in concurrence, and Lord GORDON concurred without delivering a separate opinion.

CALDWELL, J., concurred.

Bill dismissed.

CHAPTER XIX.

STATUTORY LIABILITY OF STOCKHOLDER TO CREDITOR OF CORPORATION, OVER AND ABOVE STOCKHOLDER'S LIABILITY TO PAY IN FULL THE AMOUNT SUBSCRIBED BY HIM FOR STOCK.¹

CARR v. IGLEHART.

1854. 3 *Ohio State*, 457.²

RESERVED in Hamilton county.

Oliver, for complainant.*Coffin & Mitchell*, for defendant.

PER CURIAM. This is a bill in chancery to collect the amount due upon three bank bills, issued by the Lebanon Miami Banking Company, for the payment, in the aggregate, of the sum of five dollars. It is founded upon the idea that the defendants, who were stockholders in the bank when the bills were issued, are individually liable for its debts. This liability is not deduced from any independent contract by which they undertook to pay the debts, for no such contract is alleged. Nor does it rest upon the ground that they have received the assets of the corporation which were bound for its liabilities, for no such fact is stated. Nor is it pretended that there is, in the charter of the bank, any provision, that, either expressly or by necessary implication, makes its stockholders personally responsible. It is upon neither of these grounds that relief is sought. The ground upon which we are asked to sustain the bill is, that stockholders in a corporation are individually liable for its debts, unless, by some provision of the charter or statute law, they are exempted from such responsibility. The counsel for the complainant admits that Blackstone, and divers other eminent writers upon the law, and also certain courts, have entertained a contrary opinion; but he is very clear they were all wrong, and he hopes and

¹ "Statutory liability" must, of course, depend, in every case, upon the terms of the particular statute in question. Legislative enactments on this subject have varied widely in different States at the same date, and in the same State at different dates. Some cases are inserted here, bearing on questions likely to occur under this kind of legislation; but, owing to the above mentioned diversity in the statutes, the decisions in one State may frequently afford very little assistance in other States. — ED.

² Only so much of the opinion is given as relates to a single point. — ED.

thinks this court will not be governed by such loose and inconsiderate expressions, either of text-writers or judges.

After a careful consideration of the elaborate and learned argument of counsel, we are unable to perceive that he has established the liability of the defendants. We suppose that no law is better settled than that they are not liable.

Again, the subject of this suit is too trivial.

[The opinion on this point is omitted.]

For the reasons stated, the demurrer to the bill must be sustained, and the bill dismissed.

TRUSTEES OF FREE SCHOOLS IN ANDOVER v. FLINT.

1847. 13 *Metcalf* (Mass.), 539.

THIS was an action of assumpsit, to recover the amount of the following note: "Andover, August 1st 1836. The Andover Mechanic Association, for value received, promise to pay to the Trustees of the Free Schools in the South Parish in Andover, or their order, three hundred ninety eight dollars, forty one cents, on demand with interest. John Flint, Treasurer." On the back of this note were six indorsements of a year's interest; the last indorsement bearing date October 4th 1842.

The parties submitted the case to the court upon the following agreed statement of facts: The plaintiffs were incorporated by *St.* 1801, c. 9. The Andover Mechanic Association was incorporated by *St.* 1821, c. 40, "with power," among other things, "to make by-laws for the management of said corporation and its funds, and to have all the privileges usually given, by acts of incorporation, to charitable societies." On the 27th of February 1822, at a meeting of said association, certain by-laws were adopted, which were afterwards printed and distributed, the eleventh article of which was in these words: "The members of this association pledge themselves, in their individual as well as their collective capacity, to be responsible for all moneys loaned to this association, and for payment of which the treasurer may have given his obligation agreeably to the direction of the directors."

The plaintiffs recovered judgment against said association, on the note which is now sought to be enforced against the defendant, and took out execution on said judgment, which execution was returned wholly unsatisfied, before the commencement of this action. Before this action was commenced, to wit, on the 16th of October 1845, the plaintiffs made a demand on the defendant, as a member of said association, to pay the sum now sought to be recovered. The defendant has been a member of said association from the time of its organization to the present time, and was treasurer thereof from its organiza-

tion to the 1st of January 1840. The number of the members of said association is about thirty.

The plaintiffs offer to prove, (if the proof be admissible,) by one witness, that she was a creditor of said association; that her demand remained unpaid; that when she lent money to said association, the defendant was treasurer; that she inquired of him as to the security of said corporation, and that he, in reply, informed her that the individual members of said association were liable for its debts; and that the same statement was made to her by the defendant's successor in the office of treasurer.

The plaintiffs also offer to prove by another creditor of said corporation, that when he made a loan to said corporation, the defendant was treasurer, and that he stated to the witness that he considered the individual members of the corporation liable for its debts, and at the same time furnished the witness with a copy of the said by-laws: That the witness gave said copy to another person, who will testify that he afterwards made a loan to said corporation, being induced by, and under the supposition of, the liability of the members.

The plaintiffs also offer to prove, by the testimony of a member of said association, that he and the other members thereof, so far as he knows, considered themselves liable individually for its debts; that he had attended their meetings, at which he had heard the subject spoken of by members; but that he does not know whether the defendant was present at those meetings.

The said association, on the 25th of April 1845, made an assignment for the benefit of its creditors; but the plaintiffs refused to become parties thereto.

At the time of the loan of the money sought to be recovered in this action, the defendant was treasurer of the Trustees of the Free Schools in the South Parish in Andover, (the plaintiffs,) as well as treasurer of the said Andover Mechanic Association. He resigned the office of treasurer of the plaintiffs on the 12th of December 1836.

If the aforesaid testimony be admissible, the court may draw the same conclusions therefrom which a jury would be bound to draw.

Stevens, for the plaintiffs.

Hazen, for the defendant.

DEWEY, J. The original contract was made by the plaintiffs with the Andover Mechanic Association. The plaintiffs received, for the money lent to that corporation, their negotiable note duly signed by their treasurer. Such was the form of the contract, and such has been the character given to the original promise, in the subsequent steps taken by the plaintiffs to enforce the collection of this demand. No liability, on the part of the defendant, arises from the force of the instrument given to the plaintiffs; but, if it exist at all, it is to be established by independent facts creating such liability, or by some legal enactment charging the defendant for the debts of the corporation.

Upon looking at the act incorporating the Andover Mechanic Association (*St.* 1821, *c.* 40,) we find it in the usual form of acts of incorporation, giving a corporate name and corporate powers, but imposing no individual liability on its members for the debts of the corporation. Individual liability, as incident to membership of a corporation, arises only from express legislative enactment, either in the charter, or by some general law, to which all similar corporations and their individual members are made subject. But there is no general law applicable to this species of corporations, such as exists in reference to manufacturing corporations, or corporations for banking purposes, providing certain liabilities on the individual stockholders of such corporations, in certain specified cases.

The plaintiffs, aware of this difficulty in any attempt to charge the defendant, by force of the provisions in the act of incorporation, or by reason of any general law imposing such liability on the defendant for the debts of the corporation, seek to establish their right to recover, in the present action, upon other grounds. For this purpose they rely upon the eleventh article of the by-laws of the corporation, adopted by its members soon after the passing of the act of incorporation. That by-law is in these words: [Here the judge recited the by-law, as set forth, *ante*, page 876.] The only effect that can be given to this by-law is that of an act or vote of the members of the corporation acting in their corporate capacity. It is not the act of any individual member, nor does the fact of its being found upon the records of the corporation, as a vote duly adopted, authorize the inference that all or that any number greater than a bare majority voted for its adoption. The question then arises, whether it be competent for an aggregate corporation, whose act of incorporation imposes no individual liability upon its members for the debts and contracts of such corporation, to render, by force of a by-law, each individual member a guarantor or surety for all moneys lent to the corporation. It is clearly quite foreign from the general purposes and objects, in reference to which by-laws are authorized to be made by corporate bodies. See *Rev. Sts. c.* 44, § 2, giving authority to corporations to make by-laws.

It is not, in the opinion of the court, within the corporate powers conferred upon this and similar corporations, to impose upon their members, by any such by-law, any personal and individual liability to third persons, beyond such as are specified in the charter, or in the general laws of the Commonwealth. Such a power would be liable to great abuse, and would subject every member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation by the act of a majority of those convened at a meeting of such corporation. Take the case of a bank in doubtful credit, and its active managers deem it useful to sustain it by pledging the individual responsibility of some of its more wealthy stockholders. Can they, by a corporate vote, impose upon all the stockholders a personal liability for all the debts of the

corporation? We think not, and are of opinion that each stockholder, by becoming such, subjects himself to no liability beyond that created by the force of the charter itself, or declared by other statutes of the Commonwealth.

Nor does the proposed evidence of the declarations of the defendant, that such individual liability existed in the present case, authorize the maintaining of this action. He might have mistaken his legal rights; he might have supposed such would be the effect of the by-law referred to, and therefore have made the admission. It is to be borne in mind that these declarations of the defendant were not made to the plaintiffs, but to other persons. The proposed evidence would therefore be inadmissible on a trial of this case before a jury; as it would not tend to charge the defendant. Whether for such false representations he may be held responsible to those to whom he made them, and who may have lent their money upon the faith of them, is a question not now before us. It is a fatal objection to the maintenance of the present action, that the defendant has never, by any valid legal contract, bound himself individually for the payment of the loan made by the plaintiffs to the Mechanic Association. His name was never subscribed to the pledge of the corporation, that the individual members would guaranty the debts of the corporation. His oral promises, if made, would be inoperative and void, by reason of the statute of frauds. To give any legal effect to these pledges of individual liability, they must have been the individual acts of the members, adopted and sanctioned by them by their signatures, under their own hands. Without this, the corporate act was a dead letter, and of no binding efficacy upon individual members in their personal capacity.

We see no ground upon which this action can be maintained.

Judgment for the defendant.

IRELAND v. PALESTINE, &c. TURNPIKE CO.

1869. 19 *Ohio State*, 369.¹

ERROR to the court of common pleas of Preble county. Reserved in the district court.

The defendant in error was organized as a corporation, in January, 1852, under a law of this State, passed in 1849, for the purpose of constructing a turnpike road. The plaintiff in error was one of the subscribers to the stock of the company, and has fully paid up his subscription; and the law under which the company organized imposed no individual liability upon the stockholders beyond the amount of their subscriptions.

¹ Arguments and part of opinion omitted. — Ed.

By the act of May 3d, 1852 (S. & C. 289), turnpike companies, who should accept the provisions of said act, were authorized, when they found it necessary for the completion of their roads, or for the payment of indebtedness incurred in their construction, to issue bonds for that purpose; and the stockholders of all companies accepting the act were declared to be individually liable, to the amount of their stock, for the payment of bonds so issued for the completion of the road.

By the act of April 8th, 1856 (S. & C. 338), it is provided that in all cases where the stockholders of such companies are individually liable for the debts of the company, the stockholders may, if a majority of them so determine at a meeting called for that purpose, be assessed upon their stock, and compelled to pay to the company their *pro rata* of the indebtedness of the company, not exceeding the amount of their stock.

In 1854, the company having partly constructed its road, and being largely in debt, and without means to complete the road, the board of directors accepted the provisions of said act of May 3d, 1852, and issued and sold its bonds for the necessary amount to complete the road.

In October, 1856, the bonds having matured, and the company being without other means to pay them, in pursuance of the provisions of said act of April 8th, 1856, a meeting of the stockholders was called, and by a unanimous vote of those present, a general assessment was made upon the stockholders for the necessary amount to pay the bonds. The plaintiff in error was not present at the meeting, and did not participate in the proceedings, or give his assent thereto. He refused to pay his assessment; and to recover the same the company brought an action against him in the court of common pleas. In that court judgment was rendered in favor of the company for the amount of the assessment. To reverse that judgment, the present plaintiff filed his petition in error in the district court, and the same was therein reserved to this court for decision.

There are numerous assignments of error, growing out of defences set up, and the pleadings and evidence in the case, which it is unnecessary to notice here, for the reason that this court disposes of the case upon a single question, to fully understand which it is only essential to set forth the facts above mentioned. These facts substantially appear in the original petition, and the question decided by this court is simply whether these facts make a case entitling the company to recover.

Robert Miller and A. Haines, for plaintiff in error.

Campbell & Gilmore, for defendant in error.

WELCH, J. In our judgment, the act of May 3d, 1852, in so far as it authorizes assessments against stockholders who have paid the full amount of their subscriptions, and who by the charter of the company, or the laws under which it was organized, were not individually liable for its debts, is unconstitutional. It impairs the validity of the con-

tract between the company and the stockholder. In a contract between the company and a stockholder, or in an action by the former, or its creditors, against the latter, the stockholder is to be regarded as an individual person, separate and distinct from the corporation. He becomes a stockholder by virtue of a contract with the company, and he has a right to stand upon the terms of that contract, interpreted and limited by the laws under which it was made. By his contract with this company Ireland agreed to pay a specified sum, and no more. This sum he has fully paid, and to require him to contribute an additional amount, would be to violate the contract between the parties. Let it be understood that the amount for which a stockholder becomes liable to the company by his subscription is not limited by his contract, but by the discretion of the directors, or the stockholders at large, and no prudent man will subscribe for stock in a corporation. If such be the law, it is of little importance to the subscriber whether the amount of stock taken be large or small, because it can be indefinitely increased at the pleasure of the company, whenever the legislature sees proper to give the power to do so. If a subscriber contracts to pay a sum which he deems within his means of payment, he may be called upon to contribute an amount utterly beyond those means, and which may render him bankrupt. No subscriber would be safe under such a law, or have any rule by which to determine the amount of stock he could afford to take. In vain would he look to the charter of the company, or to the provisions of the constitution and subsisting laws of the State, to learn the nature and extent of the liability he was about to incur, if that liability can, at the pleasure of the legislature, be indefinitely increased or modified by retroactive laws.

We fully agree with counsel, that the stockholder may waive his constitutional right, and become liable by his own act or consent. For this purpose, it is not even necessary he should give his express or direct consent. It may be implied or he may be estopped from denying it by his acts or by his silence and apparent acquiescence. The case of *Zabriskie v. C. C. & C. R. R. Co.*, 23 Howard (U. S.) R. 381, and other authorities cited by counsel, fully establish this. But there is nothing in the present case, either in the company's petition or in the bill of exceptions, to show any such assent or acquiescence on the part of Ireland. He is not shown to have been present at the meeting of the directors, when the bonds were ordered to be issued, nor at the meeting of the stockholders, when the assessment was made. We cannot presume his assent to these proceedings, or his acquiescence in them, from the mere fact that they took place. The burden of showing such assent or acquiescence rests with the company, or other party seeking to hold him liable, or to estop him from denying his liability. Nor was this, in our judgment, a matter as to which the directors, or even a majority of the stockholders, were authorized by law to act for him. The power of a corporation over the rights of a stockholder, whether

that power is to be exercised by the directors or by a majority of the stockholders, is limited to his rights in the corporate property and corporate concerns, and does not extend to his private and individual property. As to the latter, the stockholder gives the company no authority whatever beyond the amount of his subscription, and no subsequent legislative grant of such power will be valid without his assent. This distinction, between the private and the corporate rights of the stockholder, should never be lost sight of in construing the authorities on this subject; and its application will go far to reconcile many of those which appear to be conflicting. It will be observed that in the case cited in 23 Howard, and in fact in all the authorities relied on by counsel for defendant in error, the new power sought to be exercised was confined to the assets and property of the corporation. By becoming a member, the stockholder places a specified amount of his private property in the common fund, and subjects it to the control of the company, according to its laws and regulations; but he grants no power whatever over the remainder of his private property, which is wholly unaffected thereby. As to the latter, the company has no more authority than it has over the property or rights of a stranger. I apprehend the true rule in such cases to be, that the power of a majority of the members to accept an amendment of the charter, so as to bind the minority, is confined to such modifications of the charter as are reasonably within the original objects of the incorporation, and as regard the corporate property, and that in all other cases the stockholders can only be bound by their individual assent or acquiescence.

We are of opinion that the court of common pleas erred in rendering judgment for plaintiff below upon the case made in the petition and the facts appearing in the bill of exceptions, and that the judgment must be reversed.¹

BRINKERHOFF, C.J., and SCOTT, WHITE, and DAY, JJ., concurred.

¹ But see authorities cited in 1 Cook on Stock, Stockholders and Corporation Law, 3d ed. section 497, page 628, note 3.

As to validity of such a statute when the legislature has reserved the power to alter or amend the charter, compare 1 Cook, s. 497, page 629, note 1, and Doe, C. J., in *Dow v. Northern R. R.*, 67 New Hampshire, p. 22. — ED.

SHAW, C. J., IN GRAY v. COFFIN.

1852. 9 *Cushing (Mass.)*, 199.

To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It is, therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute.

MOYER v. PENNSYLVANIA SLATE CO.

1872. 71 *Pa. State*, p. 293.

MARCH 19th, 1872. Before THOMPSON, C. J., SHARSWOOD and WILLIAMS, JJ. AGNEW, J., at Nisi Prius.

Writs of error to the Court of Common Pleas of *Northampton county*: January Term, 1872.

In the court below a number of suits were brought to August Term 1870 against the Pennsylvania Slate Company, August Wolle and others, stockholders in the company. The suits were under the 7th section of the Act of June 25th 1864, Pamph. L. 947, incorporating The Pennsylvania Slate Company.

The section provides: "That the stockholders of said company shall be jointly and severally liable in their individual capacities for debts due mechanics, workmen, and laborers employed by said company, and for materials furnished said company."

The object of the suits was to charge the stockholders individually for debts contracted by the corporation.

The plaintiffs in the several suits and the character of their debts were as follows: —

H. K. Moyer, for hauling slate with his own team from the company's quarries, in Northampton county, to the railroad station.

J. P. Keller, for repairs done at his shop in Monroe county to the wagons used by the slate company in transporting the slate.

Charles Featherman, for lumber furnished in the erection and construction of a derrick, &c., to be used in raising slate from the quarries; also oats, hay and straw for horses and mules of the company.

Becker, Hilliard & Co., for powder and fuse for blasting slate in the quarries, and also for horse-shoes and nails, grease for wagons, files, shovels and other quarrying tools, &c.

John K. Young, for powder and fuse.

Jacob H. Featherman, for hay.

The cases of Moyer and Keller were tried by a jury, January 26th 1872, before Longaker, P. J., who instructed the jury that the debts were not such as under the 7th section of the act of incorporation would create a liability upon individual stockholders, and under the direction of the court the jury found verdicts for the defendants.

In the other actions a case was stated, and judgment was rendered for the defendants on the following opinion of Judge Longaker, which was approved by the Supreme Court and directed to be reported:—

“The question for decision is, whether or not hay sold by the plaintiff to the defendant corporation to feed the mules, which were used in transporting slate to the railroad depot, is embraced within the legal signification of the phrase, ‘materials furnished.’ Material, in its ordinary acceptation, is the substance out of which anything is made; and this is the only definition given to the noun by Webster. Material as an adjective has a much larger signification, but it is of its use as a noun that we seek its import.

“The ingredients which form a chemical compound are called chemical materials; the substances which enter into the erection of a building are called building materials; cotton and wool used by the manufacturer are the materials out of which the cloth is made, and thus the comparison might be pursued throughout every description of manufactures.

“When the stockholders of a manufacturing company are made individually liable for materials furnished their corporation, it is not pretended that the liability is of greater import than to hold them for the substances which are used in that particular line of manufacture. A cotton or woollen manufactory would be held liable for cotton and wool, but certainly not for pig-iron or powder, nor for provender furnished mules in transporting their goods, because none of these substances are used in the manufacture of woollen or cotton goods.

“It is said, if the stockholders are not to be held liable for hay furnished for the mules, it is difficult to know for what materials they are liable. Hay in its ordinary acceptation is not a material but provender, farm produce. If it were the legislative intent to protect the farmer in furnishing food for mules, the word used would have been provender, or farm produce, and not materials. If the intent be to create a liability for wares, goods and commodities, so as to protect the merchant, the word merchandise would be used. In creating the individual liability under the general Manufacturing Act of 27th March 1854, the phraseology is, ‘for machinery, provisions, merchandise, country produce and materials furnished.’

“To restrict the legal signification of materials to substances, which are actually used by the defendant corporation in the manufacture of articles, will be to limit it plainly according to the legislative intent; to give it greater scope will afford a greater license of construction than can safely be applied generally to manufacturing companies. It must not be lost sight of that the defendant, amongst other powers, has the right to manufacture slate; one branch of this manufacture may be slate for school purposes, which to be complete for the market, requires frames, and substances thus used will be materials furnished. But as this corporation may be a manufacturer, it is sufficient to know that nothing can be manufactured without material, and therefore the legal signification of the phrase, ‘materials furnished,’ is to be applied to those substances which are used in the manufacture of the articles produced, and is not to be so enlarged as to embrace everything that may fall within the general definition of matter. Hay is not embraced in the phrase, materials furnished.”

The plaintiffs removed the records to the Supreme Court.

The errors were respectively, instructing the jury to find for the defendants and entering judgment for the defendants on the case stated.

W. S. Kirkpatrick and *W. W. Schuyler* (with whom were *J. K. Dawes* and *W. Mitchell*), for plaintiffs in error. [Citations omitted.] One who hauls slate with his own team is a “laborer or workman;” so a wagon-maker is a “mechanic” within the meaning of the act, although he does work for others at his own shop. “Materials” in the act covers the articles furnished by the plaintiffs, although not actually used. The statute being remedial, everything was to be done in advancement of the remedy that could be done consistently with any construction that could be put upon it. All acts of incorporation are to be taken most strongly against the companies. Every interpretation which leads to an absurdity ought to be rejected.

E. J. Fox (with whom were *O. H. Meyers* and *H. Green*), for defendants in error. — Statutes are to be read according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operations: 1 Kent’s Com. 462, 463.

A statute which alters the common law, shall not be strained beyond the words, except in cases of public utility, where the end and design of the act appears to be larger than the words themselves: Vaugh. 179; 6 Jacob’s Law Dic. 122.

The opinion of the court in the cases of *Moyer* and *Keller* were delivered, May 12th 1872, by

THOMPSON, C. J. — These two actions were by agreement tried together below, and were brought against the above-named corporation and stockholders, under the provisions of the Act of incorporation, approved 25th June 1864. The stockholders’ liability clause in the act is as follows: “The stockholders of said company shall be jointly and

severally liable in their individual capacity, for debts due mechanics, workmen, and laborers, employed by said company, and for materials furnished said company."

The claims embraced by these suits are not of a like nature, but are within the same governing principle on the question of liability of the stockholders. The first is a claim by the plaintiff for himself and team in hauling slate from the quarry of defendant to a railroad station for shipment. The second was for repairing wagons at plaintiff's shop in an adjoining county, some five miles distant from defendant's quarry. It was assumed by the plaintiff, that these claims were good against the stockholders jointly and severally, under the provisions of the Act of Assembly referred to. The court below thought they were not.

Corporations are just what the law of their organization makes them — no more, no less; and when there is anything in the law calling for interpretation on account of ambiguous or indefinite language, we must explain the meaning in view of the objects of the enactment — its purposes — and consider the appropriateness of the language used to the supposed purpose in view by the legislature.

By the common law, the individuality of the members of a corporation was merged in the associated body, so far as liability for debts was concerned. The artificial body represented them in that. Whenever, therefore, there is a change in this particular in the act of incorporation, it is consequently just so far in derogation of the common law, and is to be strictly construed; *McMullin v. McCreary*, 4 P. F. Smith 230; that is to say, it is not to be extended by implication. Many authorities go to prove this which need not be cited. It is not to be forgotten, however, that this, as a rule, has no place where the intent is manifest from the words of the law.

The common law was certainly changed in regard to the liability of the stockholders of this company, so far as it renders them liable in their private capacity, for "debts due to mechanics, workmen, and laborers employed by said company." It has been contended by the able counsel for the plaintiff in error, that these words are broad enough to cover any claim of any mechanic for work done for the company at his shop anywhere, without regard to any connection as a mechanic of the company, and so of any laborer anywhere, whose services the company may have temporarily availed themselves of.))

Undoubtedly the corporation itself is liable for all manner of claims against it, arising out of its business, whether for money borrowed, territory acquired, teams bought, merchandise, provisions or produce obtained, or professional services; in short, for whatever may be deemed necessary to the life and prosperity of its business. This is an incident of its artificial existence, as fully recognized in law, as it is of natural persons. Employees of every description have the responsibility of the corporation to look to for payment.

Now it is plain, that when the liability to a limited extent was cast upon the stockholders personally, it was with a view to an additional security to the operatives of the establishment, who were the producers — the life of it. It is generally only to such that liens are extended in the mining districts. For them the law provides additional security; so in this case, the additional security of the individual responsibility of the stockholders is added to that of the corporation, in favor of the employees of the corporation, “its mechanics, workmen and laborers.”

If this be not the meaning of the words “employed by the company,” we see no possible use of the enumeration of the grounds of liability of the stockholders. Were it intended to hold them liable generally, enumeration, it is reasonable to suppose, would have been omitted. If the words in themselves were general enough to seem to bear the construction contended for, we are admonished by these considerations that they were not so intended. Generality of expression in Acts of Assembly, as in contracts, is often restricted by regard to the subject-matter to which it has been used: *Commonwealth v. The Councils of the Borough of Montrose*, 2 P. F. Smith, 391.

The learned judge of the Common Pleas was right therefore, we think, in holding as he did, that the charge for hauling slate, the party using his own team and contributing his own time, was not embraced by the liability clause quoted. Indeed, I regard it as not within the words at all. The teamster was not strictly either a laborer or workman, but the ruling stands well enough on the general ground suggested. His was labor of the same kind as that performed by the railroad company in transporting the slates to market, and the yardmen who took charge of them on their arrival at their destination. These parties were independent of the corporation altogether, and cannot be regarded as employees at all. All this is true of the wagon-maker's bill. He was not the mechanic of the corporation. His was an independent business under his own control and option, and he was no more entitled to avail himself of the stockholders' liability, than the horse-shoer, or the ordinary shoemaker, who might furnish shoes worn by the workmen and laborers. And so of materials furnished. That of course has reference only to such as form part or portions of the products of the establishment. Without injustice to the stockholders, we cannot hold to the general liability clause against them, and yet it is to be regretted, if loss ensue to individuals, because the corporation may be unable to pay them their dues. This, however, is the fault of the legislation on the subject. For the reasons given these judgments must be affirmed.

WILLIAMS, J. — I concur in the construction given to the act in these cases, except so far as the opinion decides that lumber furnished for the erection and construction of a derrick used in hoisting slate from the quarry, and powder and fuse used in blasting the slate, are not “materials,” within the meaning of the act for which the stockholders are individually liable.

In the other cases judgment was entered November 12th 1872.

PER CURIAM. — Our views of the liability of stockholders in this corporation have been pretty fully explained in the case of *Moyer v. The Pennsylvania Slate Company et al.*, besides which, and the opinion of the learned judge below in the case stated, embracing all the foregoing suits, nothing further is needed to show that the judgments entered therein must be *Affirmed.*

RIDER v. FRITCHEY.

1892. 49 *Ohio State*, 285.¹

ERROR to the Circuit Court of Franklin County, which affirmed a judgment rendered in the Common Pleas.

The action in the Common Pleas Court was brought by the present defendant in error, a judgment creditor of the Fairwood Street Railroad Company, a corporation, to enforce upon behalf of himself and all other creditors of the company, the statutory liability of stockholders. Fritchey was an administrator; and the cause of action upon which judgment had been rendered in his favor was a claim for damages for negligently causing the death of his intestate. In the present proceeding judgment was given in the Common Pleas against the stockholders; and this was affirmed in the Circuit Court.

Rider brought error; and his counsel argued that the individual liability of stockholders is incident only to such demands against the corporation as arise out of its contracts, not extending to such as sound in tort.

J. M. Swartz, J. V. Lee, and O. W. Aldrich, for plaintiff in error.

Charles E. Burr and T. M. Livesay, for defendant in error.

SPEAR, C. J.

A more serious question arises with respect to the second point. Can the stockholders of an Ohio corporation be held for obligations of the corporation growing out of torts? It follows from what has already been stated, that we must assume that this street railroad company was organized under a law which imposed upon stockholders just such liability as the constitutional provision requires. We look, therefore, to the constitution as our guide. The provision, section 3, of article 13, is: "Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." The question turns upon the import of the word "dues."

¹ Statement abridged. Only so much of the case is given as relates to a single point. Arguments omitted. — ED.

It has been contended that provisions creating individual liability on the part of the stockholders are in derogation of the common law, and are, therefore, to be construed strictly. Authorities in support of this rule are not wanting, and, in so far as such liability is attached by way of penalty for the omission of some act required by the statute, as in some of the states, it is probable that the weight of authority favors the proposition. But all concede that this is a remedial provision, and to hold that there must be applied to it the same test as if it were a penal law, is to hold that all remedial laws must be so construed, for every remedial law must of necessity be in derogation of the common law. Where the provision is simply remedial, though it does impose an obligation which did not attach at common law, we see no reason to insist upon what is called a strict construction, but believe that the ordinary rule which requires the court to inquire simply as to the intent of the law-makers, reading the provisions as they were intended to be read, will best attain the ends of justice. This leads us to look to the intent of the section quoted. Speaking in general terms, it must be manifest that the intent was to provide that those who derive advantage from the authority of the state, given by our incorporation laws, shall, at the same time, assume responsibility for the acts of the artificial creature which they have called into legal being, affecting the rights of others. Having in mind this general intent, and the provision being remedial, it should, we think, be construed with a view to remove the evil and extend the benefit proposed.

It is conceded that if a cause of action for a tort can be treated as a "debt," the liability of the stockholders for it would follow. The affirmative of this is asserted, and the following authorities are cited in its support. *Carver v. Manufacturing Company*, 2 Story, 432; *Milldam Foundry v. Hovey*, 21 Pick. 417; *Grey v. Bennett*, 3 Met. 522; *Smith v. Omans*, 17 Wis. 395, and *White v. Hunt*, 6 N. J. L. 418. To the contrary of this, counsel for plaintiff in error cite: *Bohn v. Brown*, 33 Mich. 257; *Cable v. McCune*, 26 Mo. 371; *Doolittle v. Marsh*, 11 Neb. 248; *Heacock v. Sherman*, 14 Wend. 59; *Archer v. Rose*, 3 Brewster, 264; *Child v. Iron Works*, 137 Mass. 516; *Cook's Stock and Stockholders*, § 220; *Morawetz*, §§ 608, 613; *Nanson v. Jacobs*, 6 S. W. Rep. 246 (Mo.); *Evans v. Lewis*, 30 Ohio St. 14; *Crouch v. Gridley*, 6 Hill, 250; *Kellogg v. Schayler*, 2 Denio, 73, and *Zimmer v. Schleeauf*, 115 Mass. 52. A review of these authorities would be important if a holding upon the proposition were necessary to a decision of the case before us. We think it is not.

It would seem to be the undoubted duty of the court to give the word "dues," as found in the section quoted, such construction as will secure the apparent object of the constitution-makers in its adoption. Constitutions are necessarily couched in terse language, and we look there for the use of words in a broad, comprehensive sense. This term "dues" is of extended import. Among other definitions Latham gives the singular: owed; capable of being justly demanded; that

which may be justly claimed. Worcester: that which any one has a right to demand. Webster: that ought to be paid or done to or for another; justly claimed as a right or property; fulfilling obligation; that which belongs or may be claimed as a right; whatever custom, law, or morality requires to be done; right, just title or claim. Bouvier defines it as what ought to be paid; what may be demanded. It seems natural to say that where one is injured by the negligence of another, reparation is due. This implies a legal demand for reparation, and in *Heacock v. Sherman, supra*, Justice NELSON admits that the word "demand," found in the New York statute, if it stood alone, would be broad enough to include a cause of action for a tort.

It is difficult to see any reason why the framers of the constitution should intend to afford one who gives credit for goods or money to a corporation a right to demand compensation of the stockholders in case of insolvency, and deny a like right to one who intrusts it with the care of his person, as in the case of a passenger, or to one even a stranger who, without fault on his part, is injured by the negligence of the corporation's agents. It may well be asked: are the rights of things more sacred than the rights of persons? Is there any rule of public policy which would justify the protection of rights arising *ex contractu*, which would not equally call for protection of rights arising *ex delicto*, or any claim for unliquidated damages? Suppose, as is suggested by Mr. Justice STORR, in illustrating his propositions in *Carver v. Manufacturing Company, supra*, a contract by a corporation to manufacture goods of a particular quality or character, or to employ workmen, to be wholly broken, so that the right of the injured party would be, not to money, but to unliquidated damages; if these would be without the purview of the statute, it would have a very narrow and inadequate range. Or, suppose a manufacturing corporation to obstruct its neighbor's mill privilege, or stop his works by back flowage, we see, at once, that an insolvent corporation might do irreparable mischief without any just redress. Or, suppose an insolvent corporation should unlawfully convert 1000 bales of cotton belonging to a third person, the mischief could be redressed only by an action of trover for unliquidated damages, and if the individual operators were not liable, after an unsatisfied judgment, the statute would be little more than a delusion. A narrow construction would exclude recovery in all these cases; a broad, liberal construction, such as should be given to a remedial provision, would afford relief, and thus attain the objects which, it would seem, was in the contemplation of the law-makers.

As conclusion, we are of the opinion that the word "dues" should receive a beneficial construction, one which will include within its scope as well a demand for unliquidated damages for a tort, as a claim for a debt, arising upon contract.

Judgment affirmed.

BROWN v. EASTERN SLATE CO

1883. 134 *Mass.* 590.

HOLMES, J. This is a suit in equity against original stockholders in a Massachusetts corporation, created November 5, 1877, who have never paid in full the par value of their shares, to establish and enforce a personal liability under the Sts. of 1870, c. 224, §§ 39 & seq., 1875, c. 177, § 1, 1876, c. 1, § 1. (Pub. Sts. c. 106, §§ 61 & seq.) The original contracts on which the plaintiff recovered his judgment at law were five promissory notes, signed with the name of the company by its treasurer, and indorsed with the name of the company by its directors. These notes were delivered under a written agreement between the plaintiff and the corporation, by which the plaintiff sold property to the company and the company was to give the notes as the price, and in pursuance of a contemporaneous oral agreement, made in a talk with the directors, "that there should be no personal liability on the notes therein [that is, in the above-mentioned writing] referred to." This agreement is one of the defences relied on.

So far as its construction is concerned, we see no reason for limiting it to the directors. No one was personally liable except by statute. The stipulation therefore must be taken to refer to statutory liability. An agreement that there should be no personal liability, in the sense of no statutory liability, means on its face no statutory liability on the part of anybody, and there is nothing in the circumstances to cut it down. The more difficult question is, whether an oral contract of this nature does not vary the written contracts, and whether evidence of it is not therefore inadmissible.

The original contract may be laid out of the case, for the reason that that would have been satisfied by the delivery of notes on which there was no personal liability. The plaintiff could not have complained if the members had paid up their stock before the notes were handed over. But the notes which were given were notes carrying a personal liability in a certain sense, and it may be argued with more force that the oral agreement attempted to vary them in their legal effect.

The agreement does not touch anything to be read on the face of the notes. In terms, the notes promise only the payment of a sum of money by the company on a certain day. They have nothing to say about the defendants at all. If then the agreement is held to vary them in their legal effect, it must be on the ground that the statute which makes stockholders liable in certain cases makes that liability a term of the notes by implication.

With regard to this, it will be observed that the statute does not create a chartered partnership which remains a partnership and con-

tracts as such, although granted certain corporate powers. It does not make or leave the members primary contractors or debtors. It creates a corporation out and out, and then imposes a secondary and subsidiary liability upon the members "for its [the corporation's] debts or contracts." The liability of the members does not arise until after the contract has been broken, a judgment recovered upon it, and execution returned unsatisfied. The corporation is the only promisor or debtor, it alone breaks the contract by its failure to pay, and it alone is sued. The liability of the members is no part of the original undertaking, but a consequence attached by the law to its breach.

But the rule excluding evidence of oral agreements to vary a writing goes no farther than the writing goes. And, at most, the writing only expresses the obligation assumed by the party signing it. If an oral agreement were set up to diminish or enlarge the extent of the promisor's liability for a breach of the written promise, it might possibly be held inadmissible on the ground that a contract is at common law nothing but a conditional liability to pay damages, defeasible by performance, and that therefore the amount of damages to be paid is part of the legal import of the written words. But, even on this point, the tendency of some Massachusetts cases has been the other way. *Ayer v. Tilden*, 15 Gray, 178, 183, 184. *Ives v. Farmers' Bank*, 2 Allen, 236. Cf. *Horne v. Midland Railway*, L. R. 7 C. P. 583, 591; *S. C. L. R. 8 C. P. 131, 140*; *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, 674, 676. And the most obvious and natural view is, that the promise is the only thing which the writing has undertaken or purports to express, either in words or by legal implication. Certainly the writing does not extend to the remedies which the law will furnish for the collection of damages, even from the promisor himself, as is shown by the fact that they are governed by the *lex fori*; and, *a fortiori*, not to the collateral statutory liability of third persons not parties to the writing. The decisions of this court have gone far towards treating such a liability as matter of remedy. *Halsey v. McLean*, 12 Allen, 438, 442. The liability in question may be part of the obligation of contracts of the corporation in a constitutional sense, so that it could not be done away with by statute as to contracts already made. *Hawthorne v. Calef*, 2 Wall. 10. But the same thing is quite as clearly true of the ordinary remedies against the promisor, which no one supposes to be part of the contract itself. So of the statute of limitations. So far as the question raised in this case is concerned, the power to collect the debt of a corporation from third persons stands on the same footing as the power to levy for it upon real estate.

We have not considered whether the oral agreement is to be regarded as made with the corporation, or with these stockholders in person through the agency of the directors. It would seem to be possible to take it either way; the consideration in the former case being the delivery of the notes, in the latter, the consent to issue them. But it is

not necessary to decide the point, because, even taking it to have been the contract of the corporation, the plaintiff could not strike at the members of that corporation in a court of equity through and by means of a transaction which bound him not to do so.

It was suggested that there was a merger by the judgment. The suggestion assumes that the oral agreement was made with the corporation; but, granting this, the agreement was not merged, for the simple reason that it was wholly on one side of the judgment, which it permitted and contemplated. The equity which it raised did not modify the contract contained in the notes, as we have said already. But if it had done so, a sufficient answer, so far as merger is concerned, would be that a joint judgment has been held not to affect even the equities of a surety in a court of law. *Carpenter v. King*, 9 Met. 511, 516.

Bill dismissed.

E. S. Mansfield, for the plaintiff.

C. S. Lincoln, A. Russ, & C. F. Donnelly, for the various defendants. 1

HARGER v. McCULLOUGH.

1846. 2 Denio (N. Y.), 119.

THE defendant was sued as a stockholder in the Rossie Galena Company. Jan. 22, 1839, the plaintiffs sold goods to the company, to be paid for in cash. Jan. 24, the company, being unable to pay, gave plaintiffs a note payable in twenty days. This note was protested for non-payment. Subsequently, the company gave the plaintiffs a bill of exchange drawn by the company on Ransom, dated March 29, 1839, payable to order of Gilbert three months after date, and endorsed by Gilbert & Shepard. The draft was protested at maturity, and notice given. Plaintiffs sued the company, and recovered judgment on the bill, docketed June 17, 1840. Execution was issued, and returned *nulla bona*.¹ Plaintiffs then sued Gilbert & Shepard the endorsers. Shepard then paid the judgment, and took an assignment of the judgment, with authority to use the plaintiffs' names to collect the debt. Shepard subsequently assigned the judgment to Storm. The present suit is brought in the name of the plaintiffs for the benefit of Storm.

Upon the trial the defendants moved for a nonsuit on the following ground (among others): The defendant as a stockholder is a surety, and he is discharged by the time which was given to the company — first, by taking the 20 day note, and second, by taking the bill of exchange at three months.

¹ Statement abridged. Only so much of the case is given as relates to a single point. — Ed.

The motion for a nonsuit was overruled. Verdict for plaintiffs.
Motion for new trial on a bill of exceptions.

E. Darwin Smith, for defendant.

A. B. James, for plaintiff.

BRONSON, C. J.

The charter makes the stockholders "jointly and severally, personally liable for the payment of all debts or demands contracted by the said corporation." (§ 9.) But they cannot be sued until a judgment has been recovered against the corporation, and an execution has been returned unsatisfied. (§ 10.) As between themselves, we have regarded the stockholders as standing in the character of partners. (*Moss v. Oakley*, 2 *Hill*, 265; *Bailey v. Bancker*, 3 *id.* 188). But in reference to creditors, they have been spoken of as guarantors or sureties of the company. (*Moss v. McCullough*, 5 *Hill*, 131.) If they are to be regarded in all respects as sureties, then it is quite clear that the defendant has been discharged by the acts of the plaintiffs, who have twice given time to the company without his consent. But I think the stockholders in their individual, as well as their corporate capacity, are principal debtors. Although they have been incorporated with many of the privileges usually granted to men associated in that form, yet the privilege of exemption from personal liability for the debts of the company has been denied to them, and their personal liability has been expressly declared. They are thus placed, in relation to the creditors of the company, upon the same footing as though they were an unincorporated association, or partnership. That is the view which was taken of the question under a charter of the same nature in *Allen v. Sewall*, (2 *Wend.* 327,) and although that judgment was reversed, (6 *id.* 335,) yet upon this point the members of the court of errors who delivered opinions agreed, substantially, in the doctrine which had been laid down by this court. And in *Moss v. Oakley* we considered the stockholders liable in the same manner as though they had gone on with the business as an unincorporated association, which is nothing but a partnership. And this doctrine was practically applied in *Bailey v. Bancker*, where we held that one member of the association or partnership could not sue another for a debt due from the company. I consider the legislature as saying to those who applied for the charter, "you may have a corporate capacity for the convenience of transacting business, and the facility of transferring your respective interests in the joint concern; but you shall remain liable to the creditors of the association in the same manner, substantially, as though you had not been incorporated." In one respect the burden was made more onerous than it would have been in going on without a charter; for the copartners are *severally*, as well as jointly liable. But that does not affect the principle. Nor is it affected by another provision, which lightens the burden, by saving the stockholders from an action until the creditor has attempted to collect the money from the corporation

by proceeding to a judgment and execution. The stockholders are debtors from the beginning, although the creditor has no remedy against them until he has first tried to collect from the company. This is no more than applying an equitable principle, which requires that the debts should be paid from the joint funds of the associates, rather than from the separate property of any one of them. I think the defendant was answerable to the plaintiffs as a principle debtor; and consequently that he was not discharged by giving time to the company.

New trial denied.

WILLIS v. MABON.

1892. 48 *Minnesota*, 140.¹

APPEAL from District Court.

James H. Foote, for appellant.

J. C. & W. H. Michael, for respondent.

MITCHELL, J. 1. This was an action brought by a creditor of an insolvent corporation to recover from certain of its stockholders on their individual liability for the corporate debts, under what is commonly called "the double liability clause" of the constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." Article ten, (10) section three, (3.) The principal question in the case is whether this provision of the constitution is self-executing, or whether it requires legislation to carry it into effect. The same question is also involved in the two cases of *McKusick v. Seymour, Sabin & Co.*, *post*, pp. 158, 172, 50 N. W. Rep. 1114, 1116,) — submitted at a later day of the present term, — and has been exhaustively argued in both cases. Some points were made by counsel in one case that were not urged in the other; but as the question is common to both cases, and as there was an understanding among counsel that all arguments presented in either should be considered in both, we shall endeavor to fully determine the question in the present opinion. In addition to this main question, counsel for the appellants in the first case, *infra*, urged that this constitutional provision is not intended to impose any "double liability" upon stockholders, but simply means that they shall be bound to pay for their stock *once* its "face amount," any device or agreement to the contrary notwithstanding, and that, having once paid for their stock in full, they are not further liable. Except for the eminence of the counsel who have

¹ Statement and arguments omitted. — Ed.

advanced this view, we would not deem it entitled to serious consideration. While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into constitutions and statutes, and have been uniformly understood and construed as providing for an individual liability of stockholders for corporate debts in addition to this risk of losing the amount of their stock. This is the meaning which has been invariably attached to this provision of our constitution. It is the one attributed to it by this court in numerous cases, although never in the form of a direct and authoritative decision; and we do not believe that the construction now sought to be placed upon it ever occurred to, or was ever advanced by, any one, until suggested by counsel in the present case. Any such construction would render the provision meaningless and useless, for all that would be accomplished by it was already fully covered by the law. If a person had subscribed for stock, and had not paid for it the amount agreed, of course he was liable to the corporation, and, through it, to its creditors; and if the stock had been issued to him as paid-up stock, when not in fact paid for, under such circumstances as to operate as a fraud upon creditors, he was, upon well-settled principles, liable to them as for unpaid stock subscriptions. The construction contended for would give the public no security beyond what they already had under the existing law. Its absurdity is rendered apparent when considered in connection with the amendment of November 5, 1872, inclosed in parentheses; for then the whole section would mean that, while the stockholders in all other corporations should be liable to pay once for their stock at its face amount, yet stockholders in manufacturing corporations need not be required to do so. The obvious intention of the provision was to add to the ordinary liability of a corporation, for its debts, the individual liability of the stockholders, to a limited amount, and that the measure of that liability should be a sum equal to the amount of stock owned or held by them. This stock is not the *subject* of the liability, but the *measure* of it; in other words, the stockholders are liable, not for the stock, but, in addition thereto, for a sum measured by the amount of the stock.

2. This brings us to the main question, viz., whether this provision of the constitution is self-executing. That such has been the general understanding of the bench, bar, and business men in this state is conceded. This court has, in a long line of cases, assumed that such was the fact. *Dodge v. Minnesota Plastic Slate Roofing Co.*, 16 Minn. 368 (Gil. 327;); *Allen v. Walsh*, 25 Minn. 543; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, (41 N. W. Rep. 1020;); *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343, (41 N. W. Rep. 1074;); *Arthur v. Willius*, 44 Minn. 409, (46 N. W. Rep. 851;); *Densmore v. Shepard*, 46 Minn. 54, (48 N. W. Rep. 528, 681.) And, so far as we are aware, the correctness of this view has never been questioned or doubted in any court, until one of the counsel in this case interposed a brief in

Arthur v. Willius, supra, in which he took the position for which he now contends. Of course it is true, as counsel suggests, that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly-discovered one, suggested at this late day by the emergencies of present litigation. The fact that no such view ever before suggested itself to the minds of court or counsel in the numerous cases where the point might have been made, and where it was to the interest of counsel on one side or the other to make it, certainly raises a strong presumption against it. Moreover, as the generally accepted view has doubtless long been the basis of the credit of corporations, it ought not now to be disturbed, unless clearly wrong. But, if the question was entirely one of first impression, we have no doubt as to how it should be determined. A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern constitution. For instances of this, see *State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189; *Reynolds v. Taylor*, 43 Ala. 420; *Miller v. Marx*, 55 Ala. 322; *People v. Hoge*, 55 Cal. 612.

Without stopping to specify, it will be found on examination that our own constitution abounds in provisions that are unquestionably self-executing, and require no legislation to put them into operation. The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature, — does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts. In almost every case cited by appellants in which a constitutional provision has been held not self-executing, it will be found either that its language indicated an intention that legislation should be had to carry it into effect, or that the nature of the provision itself was such as to render

such legislation necessary. To the first class may be referred the provision in the constitution of Missouri (quite different from that in ours) considered in the case of *Morley v. Thayer*, 3 Fed. Rep. 737, although that case really only decided that the plaintiff could not recover because he had not followed the remedy provided by statute. To the same class belongs the case of *Jerman v. Benton*, 79 Mo. 148, although it seems to have been assumed, without argument or consideration, that the constitutional provision there considered required legislation to carry it into effect. To the second class belongs *Bowie v. Lott*, 24 La. Ann. 214, in which it was held that a constitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from 10 to 50 acres," required legislation to carry it into effect. This is plain from the very nature of the provision. It furnishes no *modus operandi*, and does not provide how or by whom the land was to be divided, nor determine the exact size of the tracts. It was evidently a mere general direction to the legislature. To the same class may be referred the case of *Missouri K. & T. Ry. Co. v. Texas & St. L. Ry. Co.*, 10 Fed. Rep. 497, involving a provision in the constitution of Texas that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," although all that was decided in that case was that the defendant railway company could not, on its own motion, make the crossing without the consent of the defendant, or without resort to legal proceedings in which the conditions and limitations under which such right should be exercised should be judicially fixed and determined. *Groves v. Slaughter*, 15 Pet. 419, 499, cited by appellant, perhaps goes further than any other case in holding a constitutional provision not self-executing; but its weight as an authority is much weakened from the facts that it was not considered by a full bench, and was decided by a divided court, Justice Story being one of the dissenters. Moreover, it seems difficult to reconcile the decision in that case with the rule that prohibitory constitutional provisions are self-executing to the extent that anything done in violation of them is void; or the further rule, which that court has always professed to follow, that it would adopt the construction given to the constitution and laws of a state, not conflicting with those of the Union, by the highest court of that state.

Of all the cases cited by appellant, the one most relied on is that of *French v. Teschemaker*, 24 Cal. 518. The constitution of California provided: "Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means *as may be prescribed by law*." "Sec. 36. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for *his proportion* of all its debts and liabilities." The court held that section thirty-six (36) was not self-executing. But the decision was mainly based upon two considerations. The first was that, while this section provided that each stockholder should be liable for his *proportion* of the corporate debts, yet it did not determine what that proportion

should be, nor prescribe any rule by which it should be ascertained. The second was that section thirty-six (36) was to be read in connection with section thirty-two, (32,) which was evidently addressed to the legislature. No such considerations exist here, and hence we do not think that the case is in point. The language used in our constitution is positive and mandatory. There is nothing in it indicative of an intention that ancillary legislation should be had to carry it into effect; neither is there anything in the nature of the liability imposed, such as to render any such legislation necessary. It is in the form of a present, complete enactment, which, although elliptical in form, definitely fixes the nature and amount of the liability, and to whom the liability is incurred. As remarked in *Allen v. Walsh, supra*, "it declares the creation of a liability to the extent named in the cases referred to." It is true that a question might arise as to whether it is the person who holds the stock when a debt is contracted, or the one who holds it when the action is brought, or any one who held it at any time while the debt existed, that is liable. But this is a mere question of construction, which would exist if the same or similar language were used in a statute, as has sometimes been the case. But questions of construction, whether of a constitution or a statute, are for the courts, and not for the legislature. In fact, all the criticisms of the appellant upon this article of the constitution refer merely to supposed obscurities in its meaning, or doubts as to its construction; and the logic of his argument is that it is for the legislature to construe it, and determine its true meaning. According to his view, it means anything or nothing, according as the legislature see fit to construe it. But the people meant something by this provision, and, when that meaning is judicially determined by legitimate rules of construction, it is as obligatory on the legislature as on any one else.

Much stress is laid upon the fact that this provision contains no remedy for enforcing the liability, as indicating that it was not intended to be self-executing. We fail to perceive any force whatever in this line of argument. The maxim, *ubi jus ibi remedium*, is as old as the law itself. As was said by Lord Holt: "If a man has a right, he must have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." The maxim referred to gave occasion for the invention of that form of action called "an action on the case." The principle adopted by the courts accordingly was that the novelty of the particular complaint in an action on the case was no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Every statute made against an injury, mischief, or grievance impliedly gives a remedy, for, if no remedy be expressly given, a party has his action upon the statute. For example, "if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt for the penalty will lie." 2 Dwar. St. 677.

So where a statute requires an act to be done for the benefit of another, or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured shall have an action; for, where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident. *Ashby v. White*, 2 Ld. Raym. 938. Hence in the present case it was not necessary that the constitution should have expressly given a remedy by which a creditor of the corporation might enforce the liability of a stockholder. If it in fact created such a liability of the latter in favor of the former, there would not be the least trouble in framing a proper complaint in an action to enforce it. Of course, the remedy is always within the control of the legislature, and may be changed as they see fit, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy, and make it exclusive, if they see fit. An inference in favor of appellant's contention is sought to be drawn from the history of this provision in the constitutional convention. In the form in which it is now found, this provision was the one adopted by the Democratic wing of the convention. The provision first adopted was that "provision shall be made making each stockholder individually liable to the amount of stock held or owned by him." Counsel say, and doubtless correctly, that this would not have been self-executing, as its language was directed to the legislature, and evidently contemplated legislation to carry it into effect. In this form it was adopted by the committee of the whole, and then referred to the committee on phraseology and *revision*, who reported it back in its present form, ("every stockholder shall be liable," etc.) when it was adopted by the convention. To our minds, the material change which that committee made in the language indicates very strongly that the purpose of the change was to put the provision in the form of a self-executing enactment, and thus place it beyond the power of the legislature to defeat the object sought to be accomplished.

An argument is also sought to be drawn from subsequent legislative construction. We attach little or no importance to this. An argument either way might be made, for the legislation upon the subject of the individual liability of stockholders has been variable, and not uniformly consistent either with the theory that the constitution itself created such a liability or that it did not. Upon the theory that it did, it must be confessed that some of this legislation was superfluous, and its repeal unavailing. On the other hand, it may be said that, in passing Laws 1878, ch. 56, making stockholders in manufacturing or mechanical corporations liable for corporate debts to the amount of stock held or owned by them, the legislature must have assumed that the constitution itself created such a liability in the case of other corporations, for it is not to be supposed that they would have singled out manufacturing corporations as the only ones where such a liability

should exist. Moreover, the legislature in submitting, and the people in adopting, the amendment of 1872, excepting corporations organized for a manufacturing or mechanical business from the operation of article ten, (10,) section three, (3), of the constitution, must have supposed that this section *ex proprio vigore* created an individual liability on the part of stockholders, for otherwise the amendment was useless and unnecessary, unless it was to relieve the legislature from a sort of moral obligation to legislate on the subject.

[Remainder of opinion omitted.]

Order affirmed.

COCHRAN v. WIECHERS.

1890. 119 *New York*, 399.¹

APPEAL from an order of the General Term of the Supreme Court in the first judicial department, made July 9, 1889, which reversed an order of Special Term, denying a motion to revive an action against the executors of the defendant William A. Wiechers, and granted the motion.

The nature of the action and the material facts are stated in the opinion.

Henry Schmitt, for appellants.

Henry D. Hotchkiss, for respondents.

O'BRIEN, J. The plaintiffs are judgment creditors of the American Opera Company, Limited, a domestic corporation formed under chapter 611 of the Laws of 1875, for the incorporation of business corporations with limited liability. The capital stock of the company was fixed at \$500,000, only \$148,000 of which was ever paid in, and no certificate that the capital stock had been paid in has ever been made or recorded as prescribed by the statute under which the company was incorporated.

The plaintiffs' action is in the nature of a creditor's suit to settle the affairs of the American Opera Company, Limited, and distribute its assets, as well as the proceeds of the stockholders' individual liability among the company's creditors. (*Pfohl v. Simpson*, 74 N. Y. 137.) The complaint alleges the incorporation of the company, the amount of its capital stock, the amount paid in as above stated, and the fact that no certificate of the company had been made or filed as required by the statute.

Numerous persons have been joined as defendants with the opera company, as to whom it is alleged that they are either creditors or stockholders of the company, and among these William A. Wiechers

¹ Arguments omitted. — Ed.

was named as a defendant, as to whom it was claimed that he was a stockholder holding twenty-five shares of the stock of the company. It is also alleged in the complaint that several of the parties defendant, who were stockholders, were indebted to the company for their stock. This allegation is general, and the particular persons claimed to be so indebted are not named. Wiechers was served with the complaint and appeared and answered. On or about December 14, 1888, he died, leaving a last will and testament wherein he appointed executors. The will has been admitted to probate by the surrogate of New York county, and letters testamentary issued to the executors who have qualified and taken upon themselves the execution of the trust.

After the death of Wiechers the plaintiffs applied to the Special Term to revive and continue the action against the executors, and the Special Term denied the motion, upon the ground that the cause of action stated in the complaint against the deceased was of a penal character and did not survive. Upon appeal to the General Term from this order it was reversed and the court directed that the action be revived and continued against the executors of Wiechers, and that the plaintiffs have leave to serve a supplemental summons and complaint on the executors. From the order of reversal the executors have appealed to this court.

The cause of action stated in the complaint against the stockholders, is two fold. First, it is alleged that many of them are indebted to the company for their capital stock, and second, that as the capital stock was never fully paid in and no certificate thereof ever made or filed, the defendants who were stockholders are liable for its debts to the extent of their stock. The question is whether a liability of this character on the part of a stockholder to the creditors of a corporation survives.

If the liability is penal in its nature it is conceded that it does not survive, while if the liability is in the nature of a contract obligation it is conceded that it does.

The provisions of the statute of 1875 upon which this action is based, so far as the stockholders are concerned, is as follows: "In limited liability companies all the stockholders shall be severally and individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed."

We think the liability created by this statute survived the death of the stockholder and continues against the executors.

It is not like the liability of a trustee for neglecting to make a report, or for declaring dividends out of capital stock, or acts of a kindred character. These are breaches of duty on the part of the managing agents of the corporation for which the statute has made them liable,

and this liability cannot be said to rest upon or grow out of a contract. The liability of a stockholder in the present case is different. Upon becoming the owner of the stock he voluntarily assumes the obligations imposed by the statute, and the creditors of the corporation who trust it, may be said to do so upon the faith of the statute which is part of the contract. The statutory obligation is inherent in and forms a part of every contract that the corporation makes with creditors prior to the time that the certificate required by the statute is filed.

In *Loury v. Inman* (46 N. Y. 119), ALLEN, J., stated the principle (125, 126), as follows: "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such acts he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation."

In *Wiles v. Suydam* (64 N. Y. 173) it was sought to hold the defendant, as a stockholder in a manufacturing company, on his liability under section 10 of the act of 1848, chapter 40, a section which, in substance, is almost identical with the one now under consideration, and also, as a trustee, on his liability for all the debts, because of a failure to file a report. A demurrer on the ground of the improper joinder of causes of action was sustained. The court, distinguishing between the two kinds of liability, said (CHURCH, Ch. J.): "The cause of action against the defendant as a stockholder consists of the debt and the liability created by statute against stockholders when the stock has not been paid in and a certificate of that fact recorded. . . . The first cause of action against the defendant as a stockholder is an action on contract. The six years' statute of limitations applies. The defendant is entitled to contribution."

The liability of Wiechers, therefore, being in the nature of a contract obligation, it survived his death, and the action can be continued against his personal representatives.

In *Bailey v. Hollister* (26 N. Y. 112) the court expressly recognized this principle. GOULD, J., said: "It will be conceded that when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, it must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds, not from any new contract made by or on behalf of the estate, but is inherent in the property itself. . . . Or, calling it a contract liability, it arises out of a contract made by the stockholder, and binding his personal representatives as it bound him, as long as the relation of stockholder existed."

The liability of the estate of the deceased stockholder under the statute is so well established, upon principle and authority, that further discussion is unnecessary. (*Chase v. Lord*, 77 N. Y. 1; *Flash v. Conn*, 109 U. S. 371; *Richmond v. Irons*, 121 id. 27.)

The order of the Special Term denying the motion to revive and continue the action against the executors was properly reversed by the General Term, and its order of reversal should be affirmed, with costs.

All concur.

Order affirmed.

DIVERSEY v. SMITH.

BURKETT v. PLANKINTON.

1882. 103 *Illinois*, 378.¹

APPEALS from Appellate Court for First District.

Shufeldt & Westover, for appellant.

John S. Cooper, for Smith.

John H. Thompson, for Plankinton.

SCHOLFIELD, J. In these cases the facts are, in all material respects, similar, and the single question presented by the record, and discussed in arguments of counsel, is common to both. In each the action is debt, upon a policy of insurance issued by a company which was organized under a special charter enacted by the General Assembly long prior to July 1, 1869, against a stockholder of the company, who had become such by making, and performing on his part, a contract of subscription for stock, prior, also, to July 1, 1869. Judgments were rendered in the Superior Court of Cook county for the defendants. From those judgments appeals were taken to the Appellate Court for the First District, and while the appeals were there pending, and before argument, the defendants died, testate. The deaths of the defendants were suggested, and thereupon writs of error were sued out and served, making their executors parties. On motion of the executors, the Appellate Court dismissed the writs of error, and gave judgments for costs. To reverse those judgments the present appeals are prosecuted.

For convenience we shall treat the cases as one, and speak of the parties in the singular number only.

If the action is for a statutory penalty, it does not survive the death of the testator, and the writ was properly dismissed, as is conceded by counsel for appellant. 1 Chitty's Pleadings, (7th Am. ed.) 103, *104; *Hambly v. Trott*, Cowp. 372; *Barret et ux. v. Gaston*, Breese, 255. The question, therefore, is, whether the action is on a contract or for a statutory penalty.

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

The action is brought under the provisions of "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," in force July 1, 1869, (Rev. Stat. 1874, p. 591,) and the portions of the several sections necessary to a solution of the question before us are as follows: The 1st section authorizes any number of persons, not less than thirteen, to associate and form an incorporated company for the purpose of making insurance, etc. The 3d section requires that "such persons shall file in the office of the Auditor of Public Accounts a declaration, signed by all the corporators, expressing their intention to form a company for the purpose of transacting the business of insurance, as expressed in the 1st section of this act, which declaration shall also comprise a copy of the charter proposed to be adopted by them, and shall publish a notice," etc. The 7th section provides that "it shall and may be lawful for the individuals associated for the purpose of organizing any company under this act, after having published the notice and filed the declaration and charter, as required by the 3d section of this act, and also on filing in the office of the Auditor of Public Accounts proof of such publication, . . . to open books for subscription to the capital stock of the company so intended to be organized, and to keep the same open until the full amount specified in the charter is subscribed," etc. The 8th section directs how its capital shall be invested. The 9th section provides what real estate may be owned. In the 10th section it is enacted that "the charter and proof of publication herein required to be filed by every such company shall be examined by the Attorney General, and if found conformable to this act, and not inconsistent with the constitution or laws of this State, shall be certified by him to the Auditor of Public Accounts, who shall thereupon cause an examination to be made, either by himself or by three disinterested persons specially appointed by him for that purpose, who shall certify, under oath, that the capital herein required of the company named in the charter, according to the nature of the business proposed to be transacted by such company, has been paid in, and is possessed by it in money, or in such stocks and bonds and mortgages as are required by the 8th section of this act; . . . and the corporators and officers of such company shall be required to certify, under oath, that the capital exhibited to those persons is *bona fide* property of the company. Such certificate shall be filed in the office of the said Auditor, who shall thereupon deliver to such company a certified copy of the charter and of said certificates, which, on being filed in the office of the clerk of the county where the company is to be located, shall be their authority to commence business and issue policies; and such certified copy of the charter and of said certificates may be used in evidence for or against said company."

It thus conclusively appears that until after the Auditor of Public Accounts shall have delivered to the company the certified copy of the charter and certificates, and the company shall have filed them in the office of the proper county clerk, there is no authority whatever for

the company to commence business and issue policies, and any attempt on its part to do so before, is in direct violation of the statute, for a provision that certain things shall be done to constitute a license or authority, is equivalent to an express prohibition against the license or authority unless those things shall be done. "It is," says Dwaris, "a maxim, generally true, that if an affirmative statute, which is introductory of a new law, directs a thing to be done in a *certain manner*, that thing shall not, even although there are no negative words, be done in any other manner." Potter's Dwaris on Statutes, 72.

The command of the law then is, business shall not be commenced, and policies issued, unless those things are done which are required as a license or authority to commence business and issue policies; and to compel obedience to this command, the 16th section imposes a punishment for its violation, namely: "The trustees and corporators of any company organized under this act shall be severally liable for all debts or responsibilities of such company to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, and a certificate thereof recorded, as hereinafter provided." . . . "Dues" from such corporations "are secured as prescribed by law," in the requirement that the capital of the company "has been paid in, and is possessed by it in money, or in such stocks and bonds and mortgages as are required by the 8th section of this act," before they are allowed to commence business, and in the enforcement of this requirement by penalties of individual liability upon the trustees and corporators. Still, although the company is thus prohibited from commencing business and issuing policies before those things are done which are essential to constitute a license or authority, if, in defiance of this prohibition, it should commence business or issue policies, as between it and those with whom it should assume to contract, it would, after the other party had performed his part of the contract and the company had received the benefit of it, be estopped to deny its authority to make the contract, and would be liable thereon in an action at the suit of the creditor. *Bradley v. Ballard*, 55 Ill. 413; *Darst v. Gale et al.* 83 id. 136; *Peoria and Springfield R. R. Co. v. Thompson*, ante, 187. See, also, Field on Corporations, secs. 259, 260, 261; 2 Parsons on Contracts, 790. Such debts or responsibilities are, therefore, legally the debts or responsibilities of the company, and it is to be noted the 16th section does not provide the debts or responsibilities thus contracted shall be deemed and treated as the debts or responsibilities of the trustees or corporators, instead of the company, or jointly and severally of the trustees and corporators and company, but expressly designates them as "the debts or responsibilities of such company." The company is treated as primarily liable, and the trustees and corporators are held liable not because of *their* debt or responsibility, or of *their and the company's* debt or responsibility, but solely on account of the debt or responsibility of the company.

At common law a trustee or corporator is not liable for a debt con-

tracted by a corporation, and if he shall be made primarily liable for such debt by statute, it must be because the statute in some way makes him a contractor in such case. It must be within contemplation of law, at least, that the company can contract on behalf of trustees and corporators, or on behalf of itself and them. To create such a relation, in the absence of an express contract, the authority would necessarily have to affirmatively appear in the statute. But the statute under consideration, instead of containing language to that effect, prohibits the making of all contracts. It imposes the liability upon the trustees and corporators, not because the company was authorized to contract in their names or on their behalf, or so as to otherwise bind them, but because it prohibited the commencing of business and issuing of policies, and the trustees and corporators, in violation of their duty, caused or permitted business to be commenced and policies to be issued. Sedgwick says: "Penal statutes are acts by which a forfeiture is imposed for transgressing the provisions of the act." He moreover adds: "A penal law may also be remedial, and a statute may be remedial in one part and penal in another." (Stat. and Const. Law, 41.) In Potter's Dwaris on Statutes, 74, it is said: "A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited." It is the effect, not the form, of the statute that is to be considered, and when its object is clearly to inflict a punishment on a party for violating it — *i. e.*, doing what is prohibited, or failing to do what is commanded to be done, — it is penal in its character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant.

Accepting it as settled that the liability imposed is not a primary liability, a significant, and, to us, conclusive fact to be taken into consideration in the character of liability imposed by the 16th section is, that the plaintiff's right of recovery is totally unaffected by any actual loss or injury he may have sustained by the failure or neglect of the trustees or the corporators. Although he might collect the debt from the corporation, this is no defence. Whether all the capital, or all but a nominal sum, or whether but an insignificant amount of the capital, has been collected and paid in, would obviously be unimportant inquiries. He is only required to show that he is a creditor of the company — that the defendant is a trustee or corporator, and that the whole amount of the capital of such company has not been paid in, and a certificate thereof recorded, as provided in the 10th section of the act.

[After discussing and distinguishing various cases cited by counsel for appellant:]

Here, the statute in effect says the thing shall not be done, and if it is done, the trustees and corporators shall be liable, etc. In all the cases referred to the statute says the thing may be done, and the stockholders, etc., shall be liable, either absolutely or until some subsequent thing shall be done. In the one case the liability is in consequence of violating the law, or suffering it to be violated; in the other the liabil

ity is incurred in strict compliance with the law, — in short, in the one case the liability is for a wrong done — a *tort*; in the other it is upon contract.

And in *Weidenger v. Spruance*, 101 Ill. 285, we said, after quoting the 16th section: "The object of this was, unmistakably, to compel such companies, before proceeding further, to have their entire capital paid in. . . . It is, in effect, therefore, saying to old companies whose capital is not all paid in: 'Proceed no further. Stop right here until all your capital stock is paid in; and if you shall disregard this mandate, your trustees and corporators shall be liable for all debts or responsibilities you shall hereafter create.' This is but the imposition of a penalty." And again, in answer to the objection that such a liability impaired the obligation of the contract of subscription of the stockholder, we said: "The liability upon the stockholder is not because he made a contract, which he has performed, to take and pay for so much stock, but because he, as a member of the corporation, and, therefore, a responsible agent in controlling and causing to be executed the corporate powers and functions, has allowed to be done, or failed to prevent the doing of, that which the law prohibited. As a punishment for the wrong he is responsible for, he is made liable to those injured thereby to the extent of his interest in the corporation, and of his agency presumed therefrom in causing or permitting the injury." As we have before seen, there is a slight inaccuracy in the expression here, although we still think the main idea is entirely correct. The liability is not, in fact, to those alone who are injured, but exists equally where no actual injury has been done, as, for instance, where the corporation is abundantly able to pay all its debts; but the liability is for a wrong done to the public which, presumably, to some extent, is a wrong, also, to every creditor.

In our opinion, counsel are entirely mistaken in saying "the statute does not prescribe some new duty, or forbid some wrongful act, and declare this liability as a penalty." It forbids the wrongful act of proceeding with business and issuing policies when the capital stock is not all paid in and the certificates required by the 10th section are not filed, and declares this liability in consequence of — in other words, as a punishment for — that wrongful act. We repeat, the liability is because of the wrong, — *i. e.*, the failure to perform the duties enjoined by the statute, and not upon the contract of subscription.

Precisely the same question was before us in *Gridley et al. v. Barnes et al. ante*, 211, and we there reached the same conclusion we have reached here; and the question was again carefully considered on petition for rehearing in that case, in connection with the arguments in the present case.

We see no cause to disturb the judgments below, and they will therefore be affirmed.

Judgments affirmed.

FLASH v. CONN.

1883. 109 U. S. 371.¹

THE plaintiffs in error, who were the plaintiffs below, brought this suit in the Circuit Court of Escambia County, in the State of Florida, on January 27th, 1876. It was afterwards, on the petition of defendant, removed to the Circuit Court of the United States for the Northern District of Florida.

The declaration alleged that the defendant, on or before April 1st, 1874, was a stockholder in the Pensacola Lumber Company, a corporation organized in the State of New York, under the provisions of an act of the legislature of that State, passed February 17th, 1848, entitled "An Act to authorize the formation of a corporation for manufacturing, mining, &c., purposes," and various amendments thereof; that the defendant was the holder of seventy-five thousand dollars of the stock of said company, the entire stock being three hundred thousand dollars; that the company carried on business and had an office and an agent in said county of Escambia, State of Florida; that the company, while the defendant was the holder of the stock aforesaid, became largely indebted to the plaintiffs, which indebtedness was evinced by two promissory notes, one for \$5,000, dated September 11th, 1864, and one for \$5,946.20, of like date, and an account stated for \$2,646.47; that the plaintiffs, on February 16th, 1875, instituted their suit in the Circuit Court of said Escambia County against the said company to recover the amount due on said notes and account, and on March 15th, 1875, judgment was rendered by said court in favor of plaintiffs, for the sum of \$14,120.50 and costs; that the company having been adjudged bankrupt by the United States District Court for the Southern District of New York in the year 1875, its property could not be taken in execution to satisfy said judgment, nevertheless an execution was issued thereon and returned wholly unsatisfied; that the property of the company had been sold by order of the bankrupt court, and its proceeds would not more than pay the costs of the bankrupt proceedings, leaving nothing to be applied to the payment of said judgment or claims of other creditors against the company; that by the provisions of the act under which the company was organized, all the stockholders were severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company should have been paid in, and a certificate thereof made, signed, and sworn to by the president of said company and a majority of its trustees, and recorded in the office of the clerk of

¹ Portions of argument and opinion omitted. — ED.

the county where the business of the company was carried on. It is averred that the company failed to comply with the said provisions of the act, and did not, by its president and a majority of its trustees, make, sign, swear to, and record said certificate, either in the county of New York, the county in which the operations of said company were by its articles to be carried on, or in the said county of Escambia, in which the company carried on business, or in anywise as required by the act, so as to exempt the defendant from his individual liability. Wherefore, the declaration alleged, the defendant became liable to the plaintiffs for the said debt and contract made by the company, and the plaintiffs claimed \$28,000.

The defendant filed ~~six~~ pleas, to some of which the plaintiffs demurred and to others filed replications. The defendant filed a rejoinder to one of the replications, to which the plaintiffs demurred.

The cause was heard upon the several demurrers, and the court rendered the following judgment:

“This cause came on to be heard upon the plaintiffs’ demurrers to defendant’s first, second, fifth, and sixth pleas, and to defendant’s rejoinder to plaintiffs’ replication to defendant’s third plea, and the court having determined that the plaintiffs’ declaration is insufficient in law, it is, therefore, considered by the court that plaintiffs take nothing by their said suit.”

From this judgment the writ of error is prosecuted.

E. A. Perry, for plaintiffs in error.

Michael L. Woods, for defendant in error.

III. The liability set forth in the declaration, being in the nature of a penalty imposed by a statute of New York, cannot be enforced in Florida. *Halsey v. McLean*, 12 Allen, 438; *Bird v. Hayden*, 1 Robertson, 383; *Derrickson v. Smith*, 3 Dutcher (N. J.), 166; *First National Bank v. Price*, 33 Md. 487; *The State v. John*, 5 Ohio, 217; *Cable v. McCune*, 26 Mo. 371; *Lawler v. Burt*, 7 Ohio St. 340.

IV. The declaration is bad, because it does not show that the liability it sets up had been fixed and made actionable by legal proceedings against the corporation in the State of New York. The 10th and 24th sections, construed together, show that the liability created by the former is inchoate; and that it is the return of the *fi. fa.* unsatisfied which makes the liability of the stockholder absolute, fixed, and actionable. To have that effect, the execution must necessarily be issued by the court of the State which declares by statute it shall have such effect; for it is well settled, that when a statute confers a right and prescribes a remedy, that remedy, *and that remedy only*, can be pursued. *Pollard v. Bailey*, *Knowlton v. Ackley*, *supra*. But the force and effect of an execution issued by a Florida court against a New York corporation must be determined by the laws of Florida, not those of the State of New York. Story, Conflict of Laws, sec. 556-9.

V. The case made by the declaration and the sixth plea, upon the de-

murrer to the latter, is not the subject of a common-law action, but of a bill in equity. In *Terry v. Tubman*, 92 U. S. 156, this court said :

“The case of *Pollard v. Bailey*, 20 Wall. 520, is an authority against the maintenance of a separate action by one creditor who seeks to obtain his entire debt, to the possible exclusion of others similarly situated. The proper proceeding is in equity, where all claims can be presented, all the liabilities of the stockholders ascertained, and a just distribution made.”

WOODS, J. The only question arising upon the record is whether the declaration presents a cause which entitles the plaintiffs to recover in this action. This was the question considered by the court below, and upon what it deemed the insufficiency of that declaration its judgment was based. The sufficiency of the pleas and rejoinder were not considered, for, if the declaration was bad, the question whether the pleadings of the defendant were good was an immaterial one. If the pleas and rejoinder of the defendant had been adjudged good, that would not have been a final judgment to which a writ of error would lie, but the plaintiffs would have had leave to reply and surrejoin. We are, therefore, limited to the consideration of the sufficiency of the declaration.

The liability which this suit was brought to enforce arises, as the plaintiffs contend, on the tenth section of the act mentioned in the declaration, namely the act of the legislature of New York passed February 17th, 1848, entitled “An Act to authorize the formation of corporations for manufacturing, &c., purposes.” The tenth section of the act and the eleventh and twenty-fourth, which also have reference to the liability of stockholders of the company, were as follows :

“SEC. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section.

“SEC. 11. The president and a majority of the trustees, within thirty days after the payment of the last instalment of the capital stock so fixed and limited by the company, shall make a certificate stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the president and a majority of the trustees ; and they shall within the said thirty days record the same in the office of the county clerk of the county wherein the business of said company is carried on.

“SEC. 24. No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be

brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder . . . until an execution against the company shall have been returned unsatisfied in whole or in part."

Section 12 of the act will also throw some light on the present controversy. It provided that within twenty days from January 1st in every year every company organized under the act should make a report, which should be published, which should state the amount of the capital of the company, the proportion paid in, and its existing debts, and which should be signed by the president and a majority of the trustees and verified by the oath of the president and filed in the office of the clerk of the county where the business of the company was carried on; and if any of said companies should fail to do so all the trustees of the company so failing should be jointly and severally liable for its debts then existing.

The defendant contended on several grounds that the declaration set out no cause of action on which the suit could be maintained against him. The first ground was that the liability of the stockholders under section 10 of the act under which the company was organized, and which the suit was brought to enforce, was in the nature of a penalty, and could not be enforced in any court sitting beyond the limits of the State by which the law was passed.

[The learned Judge held, that the liability imposed by section 10 is a liability arising upon contract, and not a liability in the nature of a penalty. Compare *Cochran v. Wiechers*, ante, p. 901.]

The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is, therefore, clear. *Dennick v. Railroad Co.*, 103 U. S. 11.

The next contention of the defendant is that the recovery of a judgment against the company in the State of New York on the debt due the plaintiffs, and the issue of an execution thereon, returned unsatisfied, is a necessary condition to the liability of the defendant; and as the declaration only avers the recovery of a judgment in the State of Florida, it is insufficient.

It appears from the declaration that before the year allowed by section 24 of the statute, for bringing suits against the company on the debts due the plaintiffs had expired, the company had been adjudicated a bankrupt by the District Court of the United States for the Southern District of New York; that all its property had been sold, and the proceeds thereof were insufficient to pay the costs and expenses of the bankruptcy proceedings.

Although it has been held by the court of appeals, in the case of the *Rocky Mountain Bank v. Bliss*, 89 N. Y. 338, that a judgment in a court of the State of New York was necessary to fix the liability of a stockholder under section 10 of the act under consideration, yet the same court, in the case of *Shillington v. Howland*, 53 N. Y. 371, held that in an action brought to charge a defendant as stockholder in a

company organized under the same law, an adjudication in bankruptcy of the company excused a compliance with the condition which required a suit to be brought against the company within a year after the maturity of the debt, and a judgment to be recovered and an execution to be issued thereon and returned unsatisfied. We see no reason why we should not follow this decision, and it is conclusive of the question under consideration.

The object of section 24 was to compel the creditor to exhaust the assets of the company before seeking to enforce the liability of the stockholder. When the declaration shows that this was done, and that a literal performance of the condition would have been vain and fruitless, the performance of the condition may well be held to have been excused.

Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of *Pollard v. Bailey*, 20 Wall. 520, *Terry v. Tubman*, 92 U. S. 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a pro rata distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit in equity.

But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can. Such actions are maintained without objection in the courts of New York, under section 10 of the statute relied on in this case. *Shilling-ton v. Howland*, 53 N. Y. 371; *Weeks v. Suydam*, 64 N. Y. 173; *Hundy v. Draper*, 89 N. Y. 334; *Rocky Mountain Nat. Bank v. Bliss*, Id. 338.

We have considered all the objections made to the declaration. In our opinion none of them are well founded.

Our conclusion is, therefore, that the declaration was sufficient, and it follows that

The judgment of the circuit court must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

DERRICKSON v. SMITH.

1858. 27 *New Jersey Law* (3 *Dutcher*), 166.¹

THIS was an action of assumpsit, brought in the Morris Circuit Court.

The defendants filed a demurrer to the declaration, and the Circuit Court certified the case to this court for an advisory opinion.

The grounds of demurrer appear in the opinions delivered in this court.

Argued at February term, 1858, before the CHIEF JUSTICE, and Justices ELMER, HAINES, and VREDENBURGH.

Whelpley, for plaintiffs.

Dabrymple, for defendants.

GREEN, C. J. This action is founded upon a provision of the statute of the State of New York entitled, "an act to authorize the formation of corporations for manufacturing, mechanical, or chemical purposes," passed February 17th, 1848. By the 12th section of said act, it is enacted, that every such company shall, annually, within twenty days from the first day of January, make a report, which shall be published in some newspaper published in the town, city, or village, or if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts; which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on: and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

The only question certified for the opinion of this court is, whether the neglect of the company to comply with the requirements of the statute of the state of New York entitles the plaintiffs to recover of the defendants in the courts of this state the amount of their claim against the corporation.

The declaration sets out the statute upon which the action is founded; the organization of the company under the provisions of the statute;

¹ Portions of the opinions are omitted

It will be noticed that this case and the next relate to statutes imposing individual liability upon *officers* of corporations. But both decisions have an obvious bearing upon the extra-territorial effect of statutes imposing liability upon *stockholders* in case of certain defaults. — ED.

the indebtedness of the company to the plaintiffs; that the intestate became a trustee, and that while he was such trustee there was a failure of the company to perform the requirements of the statute, by reason whereof the defendants' intestate became liable to pay the amount of the indebtedness of the company to the plaintiffs.

The objection to the right of the plaintiffs to recover is, that the alleged liability of the defendant, being a mere creature of the statute of a foreign state, cannot be enforced out of the jurisdiction of such state.

The general principle is conceded, that penal laws are strictly local, and that the penal statutes of one state can have no operation in another state. *Story's Conf. of L.* § 620, 621. But it is insisted that the provision of the statute which renders the defendant liable is not a penalty in any proper sense, but that the liability of the defendant is founded upon contract.

It has been decided in the state of New York, and seems to be now settled after some conflict of authority, that where a statute or act of incorporation declares that the individual corporators shall be jointly and severally liable for the debts of the corporation, such liability is not founded on the statute, and that a suit against the stockholder, to charge him individually with a debt contracted by the corporation, pursuant to a provision in the act of incorporation, is not an action upon the statute for a forfeiture. *Corning v. McCullough*, 1 *Comst.* 47; *Freeland v. McCullough*, 1 *Denio* 414; *Harger v. McCullough*, 2 *Denio* 119; *Moss v. Oakley*, 2 *Hill* 265; *Bailey v. Bancker*, 3 *Hill* 188; *Moss v. McCullough*, 5 *Hill* 131; *Moss v. McCullough*, 7 *Barb.* 279.

In such case it is held that the stockholders are liable, in an original and primary sense, like partners or members of an unincorporated association, and that their liability is not created by the statute of incorporation. That the effect of such enactment is to invest the company with a qualified corporate capacity, and not to confer upon the stockholders, either directly or indirectly as the consequence of such incorporation or otherwise, any exemption or immunity from personal liability for the debts of the company, to be contracted in its corporate name and capacity.

Without calling in question the soundness of this conclusion, but conceding, for the purpose of the present inquiry, the law to be as settled by the result of these authorities, the present case does not fall within the reach of the principle. In the statute upon which those decisions were founded, the stockholders were declared to be liable for the debts of the corporation, in like manner as if they were members of an unincorporated company. The act of incorporation was so limited or qualified that it did not exempt the stockholders from individual liability for the debts contracted by the corporation; consequently each individual corporator became liable for every debt of the body corporate. Such liability he voluntarily assumed by becoming a member of the corporation. The personal liability of the stockholder

to pay the debt is the immediate and necessary consequence of the contract made by the company. It becomes, by the terms of the charter, his debt.

It is clear that this reasoning has no application to the case now under consideration. It is not claimed that the defendant, by the act of incorporation, is individually liable, as a corporator, for the debts of the body corporate, or that his liability attached as a necessary result of the contract made by the company. His liability results from the failure of the trustees to comply with the requirements of the statute. It is, in fact, a penalty inflicted upon the trustees for a failure to perform a duty enjoined by the statute. It is immaterial whether that penalty be a specified sum or the payment of the debts of the corporation. In either case it is a penalty imposed by statute; nor is it perceived how the liability of the individual trustee to pay the debts of the corporation can be said, in any proper way, to be founded on contract. It certainly did not result from the contract made by the corporation, nor from the defendant becoming a stockholder, nor from his accepting the office of trustee, but solely from the omission to comply with the statute. Now the acceptance of the charter, or the defendant becoming a stockholder, is doubtless an assent to the terms of the charter, but it is, in no appropriate sense, an engagement to pay the debts of the company, imposed as a penalty for violations of the charter. Such liability is clearly the creature of the statute.

In *Ex parte Van Riper*, 20 Wend. 617, it was held that the liability of a director of the Belleville Bank, incorporated by a law of this state, (*Pamph. Laws 1833, p. 136.*) for the debts of the corporation was a personal liability, which might be enforced in the state of New York. But in that case, also, the charter declared that the president and directors of the company should be individually, jointly, and severally liable for the payment of any bills obligatory or of credit, note or notes, that they, or any of them, might issue and circulate. The contract of the corporation was virtually the contract of each director. The individual liability of the director was the immediate result of the contract, and was founded upon it. It is true that, in order to maintain an action against the individual director, a demand of payment at the bank and refusal was necessary. But this related to the mode of enforcing the remedy, and was not the foundation of the liability. The utmost effect which the provision could have upon the individual liability of the director, would be to place him in the position of a surety or guarantor for the payment of the debts of the corporation. But still his liability was the direct result of the contract of the corporation, which, by the provision of the charter, was virtually the contract of each director.

With every disposition to yield to the claims of comity, and to sustain, as far as we lawfully may, what may be deemed the salutary legislation of a sister state, I am of opinion that there is no principle upon which the present action can be sustained in the courts of this state, and that the Circuit Court should be advised accordingly.

ELMER, J.

The case is by no means free from difficulty; but the conclusion to which I have come is, that the liability imposed on the trustees for a neglect to file and publish a report, as the act requires, is in the nature of a penalty for an official neglect of duty, which cannot be enforced out of the jurisdiction of the state which imposed it, and which could not be enforced there against administrators. The case is very much like the action of debt given by statute against an officer who suffers a person in execution to escape, which it is held does not survive against an executor. *Williams on Executors* 1064. The statute in question enacts that, in the event of their being guilty of a particular neglect of duty, the trustees shall be liable to pay the debts of the company; which is the same in substance as a provision, that in the event of permitting an escape, the sheriff shall be liable to pay the debt for which the prisoner is in custody. There is no original liability in either case, and nothing in the nature of a contract between the creditor and the officers.

By the provisions of the act now in question, the trustees are liable to the creditors of the company, as stockholders, to an amount equal to the amount of stock held by them respectively, which may very properly be considered as a part of the original responsibility upon the faith of which dealers contracted with the company. But superadded to this is a liability to the whole extent of the indebtedness, which is to arise out of a neglect of duty imposed on them as officers of the company. This neglect is in the nature of a *tort*, and the consequent liability is the penalty which they are to pay. It is altogether different from the original liability of a partner, and in my opinion cannot, by any fair reasoning, be brought within the terms of the original contract. Dealers with the company undoubtedly had a right to expect reports which would enable them to judge as to the solvency of the company; and so they would, had the neglect to make them been made punishable by indictment or by a specific penalty, payable to an informer or to the creditor. Had the neglect to report been followed by those consequences, it is undeniable that the defaulter could only be punished in his lifetime, and by proceeding in New York. The liability actually imposed is a liability expressly created by the statute, and never existed until the neglect occurred which entitled the creditors to claim it. The original indebtedness was that of the corporation and of the stockholders to the extent of their stock. The trustees, by neglecting to report were made liable, by way of punishment for an offence.

I am therefore of opinion that the Circuit Court be advised to enter a judgment for the defendants.

[The concurring opinion of VREDENBURGH J., is omitted. HAINES, J. concurred.]

Judgment for defendants.

HUNTINGTON v. ATTRILL.

1892. *Law Reports* (1893), *Appeals*.¹

[BEFORE the Judicial Committee of the Privy Council.]

ON Appeal from the Supreme Court of Appeal for Ontario.

Sir *Horace Davey*, Q. C., *Finlay*, Q. C., and *Pollard*, for appellant.Sir *R. Webster*, Attorney General, *Gore*, and *Ackwith*, for respondent.

LORD WATSON. The appellant, in June, 1880, became a creditor for money lent to the Rockaway Beach Improvement Company, Limited, which carried on business in the State of New York, being incorporated pursuant to Chapter 811 of the State laws of 1875. Sect. 21 of the Act provides that: "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

The respondent was, in June, 1880, a director, and in that capacity an officer of the company within the meaning of the statute. On the 30th of that month he, along with other officers of the company, signed and verified on oath, as prescribed by sect. 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash.

In the year 1883, the appellant instituted a suit against the respondent before the Supreme Court of New York State for the unpaid balance of his loan to the company, alleging that the certificate contained representations which were material and false, and that the respondent had incurred personal responsibility for the debt as provided by sect. 21. The respondent defended the action; but, a verdict having been found against him, the Court, on the 15th of June, 1886, gave final judgment, ordering him to pay to the appellant the sum of \$100,240.

Having failed to recover payment, the appellant, in September, 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the municipal law of New York; and that the action being one of a penal character ought not to be entertained by the Courts of a foreign State.

Mr. Justice Street, who tried the case, being of opinion that the enactments of sect. 21 were strictly punitive and not remedial, dismissed the action with costs. The judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Mr. Justice Osler were of opinion that the statutory remedy given to the appel-

¹ Statement and arguments omitted. — ED.

lant as a creditor of the company being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Mr. Justice Burton was of the same opinion, but held himself precluded from giving effect to it for reasons which he thus explains : "The Courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed ; but those decisions are the law of the State of New York, and with that we are dealing. I am of opinion, therefore, that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here." In the conclusion thus stated, Mr. Justice Maclellan expressed his concurrence. But the learned judge, in that respect agreeing with the Court of First Instance and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was "passed in the public interest, providing a punishment for an offence," and that "it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts."

Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced ; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries ; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Mr. Justice Story in his "Conflict of Laws," and by other text writers ; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one

representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country.

Their Lordships have already indicated that, in their opinion, the phrase "penal actions," which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation, the word "penal" may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well-known case (*Folliott v. Ogden*,¹ and *Ogden v. Folliott*),² and also by Chief Justice Marshall, who, in *The Antelope*,³ thus stated the rule with no less brevity than force: "The Courts of no country execute the penal laws of another." Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions "penal" and "penalty," when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin v. The Pelican Insurance Company*.⁴ By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the commissioner of insurance, an official entrusted with the administration of the Act in the public interest, one half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books, and the *dictum* by Chief Justice Marshall already cited, went on to say: "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any

¹ 1 H. Bl. 135.

³ 10 Wheaton, 123.

² 3 T. R. 734.

⁴ 127 U. S. (20 Davis) 265.

violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community.

The New York Statute of 1875 provides for the organization and regulation of corporations formed for the purpose of carrying on all kinds of lawful business with the exception of certain branches therein specified. It confers rights and privileges upon persons who choose to form a trading association, and to become incorporated under its provisions, with full or with limited liability; and, in either case, it varies and limits the rights and remedies which, under the common law, would have been available to creditors of the association, as against its individual members. On the other hand, for the protection of those members of the public who may deal with the corporation, the Act imposes upon its directors and officers various stringent obligations, the plain object of which is to make known, from time to time, to all concerned, the true condition of its finances. Thus they are required (sect. 18) to publish an annual report stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report; and (sect. 37) to certify the amount of capital stock paid in within thirty days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any material representation, is that every director or officer who vouched its accuracy becomes, under sect. 21, liable personally for all the debts of the corporation contracted during his period of office.

The provisions of sect. 21 are in striking contrast to the enactments of sect. 34, which inflicts a penalty of \$100 upon every director or officer of a corporation with limited liability, who authorises or permits the omission of the word "limited" from its seal, official publica-

tions, or business documents. In that case, the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county." It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty, nor the decree of a New York Court for its amount, could be enforced in a foreign country.

In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Mr. Justice Osler, they give "a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors.

A number of American authorities were cited in the course of the argument, which may be briefly noticed, seeing that they were made the subject of comment in both Courts below. With one exception, they do not appear to their Lordships to have a direct or material bearing upon the point raised in this appeal.

In *Steam Engine Company v. Hubbard*,¹ the facts were these. The law of Connecticut, in the event of the president and secretary of a corporation intentionally neglecting to issue a certain certificate, made them jointly and severally liable "for all debts contracted during the period of such neglect." Under that provision an action was brought by a creditor of the corporation against its president, for a debt contracted before the period of neglect began, which remained unpaid during its continuance. There was no question as to enforcing the claim in another State. The Supreme Court of the States held that the enactment was penal, and, therefore, to be strictly construed; and also that the president was not liable, inasmuch as the debt was not contracted during the period of his default. The decision appears to be absolutely right; but their Lordships apprehend that the canon of construction applied in that case would be equally applicable to the case of penalty stipulated by bond, or in a mercantile contract.

Flush v. Conn.,² another decision of the Supreme Federal Court, was relied on by the appellants. In that case a New York Statute of 1848 had provided that, until the whole capital stock of the corporation was paid up, every stockholder should be liable to its creditors to an amount

¹ 101 U. S. (11 Otto) 188.

² 109 U. S. (2 Davis) 371.

equal to the amount of stock held by them. It was decided that the claim of a creditor under that provision was contractual and not penal, and might therefore be enforced by an action at law. The result appears to be inevitable, because the liability was not imposed in respect of failure to perform any duty prescribed by the Act; but it throws no light upon the present question.

The respondent, in his argument, placed great reliance upon *Merchants' Bank v. Bliss*,¹ which was decided in 1866. The statute of 1848, already referred to, required the trustees of the corporation to make a report at a stated period, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was this — whether the action was for a “liability created by statute, other than penalty or forfeiture,” within the meaning of the Statute of Limitations, or “for a penalty or forfeiture, when action is given to the party aggrieved”? The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years. In another case, *Wiles v. Suydam*,² the same Court held that a similar claim by a creditor, being for a statutory penalty or forfeiture, could not be joined in a declaration with a claim upon contract. Their Lordships see no reason to question the propriety of these decisions, but it is hardly necessary to say that a delict may give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State.

*Attrill v. Huntington*³ is, however, an authority upon the very point raised in this appeal. During the dependence of the present action, the appellant preferred a bill in equity, before the Supreme Court of the State of Maryland, to set aside certain transfers of stock by the respondent, upon the allegation that they were fraudulently made in order to defeat his claims under the decree of June, 1886. The primary judge granted the relief craved, but the Court of Appeal, by a majority of five judges against two, reversed his decision and dismissed the bill, holding that the decree, being for a penalty, could not be enforced beyond the limits of the State of New York. Their Lordships are constrained to differ from the reasons assigned by Mr. Justice Bryan in delivering the judgment of the majority, which do not appear to them sufficiently to recognize the distinction, from an international point of view, between a suit for penalty by a private individual in his own interest, and a suit brought by the government or people of a state for the vindication of public law. The distinction is clearly pointed out in the opinion of the dissentient judges as expressed by Mr. Justice Stone, in whose reasoning their Lordships concur.

¹ 35 N. Y. (8 Tiffany) 412.

² 64 N. Y. 173.

³ 70 Maryland, 191.

Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York, for punishment of an offence against their municipal law, their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to give decree in favour of the appellant, with costs in both Courts below. The appellant must have the costs of this appeal.¹

MARSHALL *v.* SHERMAN.

1895. 148 *New York*, 9.²

APPEAL from judgment of the General Term of the Supreme Court in the third Judicial department, entered upon an order made February 12, 1895, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order overruling a demurrer to the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Chester B. McLaughlin, for appellant.

Frank N. Hagar, for respondent.

O'BRIEN, J. This action was brought by a creditor of the Miltonvale State Bank, a corporation organized under the laws of Kansas for banking purposes, against the defendant, a stockholder residing in this state.

The questions in the case arise upon the defendant's demurrer as to the sufficiency of the complaint and the necessary parties to the action. The complaint avers that the bank was incorporated under the laws of Kansas on or about the 8th of July, 1886; that it continued to transact a banking business in that state until the 12th of July, 1891, when proceedings were instituted against it in the District Court of the county of that state where it was located, which resulted in the appointment of a receiver to wind up its affairs, and that it has not since that date transacted any business, and before the commencement of this action was dissolved, leaving debts unpaid; that since the 7th day of October, 1889, the defendant has been the owner of thirty shares of the

¹ The above decision was rendered Feb. 17, 1892. On Dec. 12, 1892, another case arising out of an attempt to enforce the same New York judgment was decided in the Supreme Court of the United States. In this latter case, as in the one before the Privy Council, it was *held*, that the statute in question is not a penal law in the international sense, so that it cannot be enforced in the courts of another State. The test is, whether the purpose of the statute is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. *Huntington v. Attrill*, 146 U. S. 657; GRAY, J., p. 666 to p. 683. — ED.

² Arguments omitted. — ED.

capital stock of the bank, the par value of which is stated to be \$3,000 ; that at the time of the appointment of the receiver the bank was indebted to the plaintiff, as a depositor, in the sum of \$191.84. It is then stated that the plaintiff is the owner, by assignment or transfer, of the claims of fifteen other depositors to whom the bank was indebted at the time of the appointment of the receiver, in various small sums, upon which, together with the claim held by the plaintiff in his own right, judgment was recovered in the courts of Kansas for the sum of \$1,804 damages and \$19.15 costs, on the 5th of September, 1891 ; that the plaintiff caused execution to be issued upon this judgment against the property of the bank, which was returned unsatisfied ; that the corporation is insolvent, and that \$880.41 has since been paid to the plaintiff on this judgment by the receiver. Judgment against the defendant as a stockholder is demanded for the balance unpaid, with interest from the date of the rendition of the judgment. The complaint sets forth certain provisions of the Constitution of the state of Kansas, and the statutes of that state which, it is claimed, impose a legal liability upon the defendant in the courts of this state for the payment of the money still due upon the judgment. The provision of the Constitution of that state which is the foundation of the alleged liability, reads as follows : " Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law ; but such individual liability shall not apply to railroad corporations nor corporations for religious and charitable purposes." The statutes for the enforcement of this liability enacted by that state, and set forth in the complaint, are embraced in two sections of the laws with respect to the liability of stockholders in corporations. They are as follows : (Sec. 44) " If any corporation created under this, or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit ; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively ; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company was dissolved."

The other enactment is section 32 and is set forth in the complaint as follows : " Execution against stockholders' action. — That if any execution shall have been issued against the property or effects of a

corporation, except a railway, or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The defendant demurred to the complaint upon the grounds, among others, that it appears upon its face that there is a defect of parties defendant, in that all the stockholders of the bank were not made defendants, and, second, that the complaint does not state facts sufficient to constitute a cause of action.

The complaint contains no allegation as to the meaning or effect of these statutes, or of the provision of the Constitution quoted under the adjudications of the courts of Kansas, nor any allegation that any judgment has been obtained against the defendant in the courts of that state upon his liability as a stockholder, under these provisions of the local law. We are, therefore, obliged to construe them ourselves, with the aid of such rules and upon such principles as the courts of this state apply in the construction of such enactments here.

A right of action against the stockholders of a corporation does not exist at common law, and ordinarily exists only by virtue of some statutory enactment. In this case the right of action is founded upon the Constitution and statutes of another state. We think it quite clear that the provision of the Constitution referred to is not self-executing, and of itself creates no liability whatever. The language used plainly contemplates that legislation was necessary in order to make it effectual. It was intended simply to confer authority upon the legislature of that state to legislate upon the subject, and perhaps it imposed upon that body the duty of securing the debts of corporations by imposing upon the stockholders an individual liability, and by such other means as in its discretion it should deem proper, always limiting such power and discretion by the provision that each stockholder should be made liable to an amount equal to the stock held by him. The legislature did enact such statutes, and it is these enactments and not the Constitution itself which is sought to be enforced in this action. (*Groves v. Slaughter*, 15 Peters, 449; *Morley v. Thayer*, 3 Fed. Rep. 737; *May v. Black*, 77 Wis. 101; *Fusz v. Spaunhorst*, 67 Mo. 256; *French v. Teschemaker*, 24 Cal. 518.) The question is thus presented whether a right of action unknown to the common law and existing only by force of the statutes of another state, can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. The defendant's relation to the corporation is governed by the laws of

the state of its creation, and the general rule is that the statutory liability of stockholders in foreign corporations cannot be enforced except at the domicile of the corporation when the law of the domicile provides the remedy. In *Erickson v. Nesmith* (4 Allen, 233) the court said: "There seems to be no practicable mode of dealing with such corporations and its members, when seeking to charge the latter upon the statute liability, but to proceed in the manner prescribed by the statute creating such liability, and in the local jurisdiction where the corporation was established and carries on its business, and by whose local statutes alone the responsibility exists." We think that when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a special and peculiar remedy against the stockholders of a corporation created under the laws of that state. From their whole structure and scope it is apparent that they were intended to operate and be enforced only within that jurisdiction. It is quite clear that as to some of their provisions, at least, it would be impossible to enforce them in this state, and they should be construed as enactments *in pari materia*, and as a whole. If it appears that they cannot as a whole scheme be given full effect in this state, we ought not to detach some particular provision from the general context with a view of ascertaining whether that is or is not enforceable beyond the local jurisdiction. But without reference to the special and peculiar provisions of these statutes, we think that the general current of authority is to the effect that such enactments are to be enforced only within the jurisdiction of the sovereignty where they exist. Some of the authorities will be referred to hereafter.

The judgment of the learned court below seems to have proceeded principally upon the ground that the liability of the defendant as a stockholder of the insolvent bank in another state is primary and contractual. It is quite doubtful, at least, whether any such relation exists between the stockholders of the corporation and its creditors after the capital stock has been paid in and the organization of the corporation completed so as to give it legal capacity to make contracts and incur obligations for itself. The statutes of this state, as construed by judicial decisions, seem to recognize that relation only in cases of liability before the capital stock is paid in. Up to that time the liability of stockholders has been likened to that of partners engaged in a joint enterprise, which, however, disappears upon the perfection of the corporate organization. We have had occasion recently to examine that question in the case of *First Nat. Bank of Auburn v. Dillingham* (147 N. Y. 603), and we adhere to the views there expressed with reference to this question, as well as other questions there decided and which seem to be involved in this case. It is true that the liability sought to be enforced in that case differed in its nature from that involved in the case at bar, since it was not an action to enforce a stockholder's liability but that of trustees for disregard of an express statute. The liability in that case was penal in its nature. Here it is not, and

yet it cannot be said that it arises upon contract in the general sense, as it would not exist but for the terms of the statute. The voluntary purchase of the stock by defendant would not of itself create any liability (*Jessup v. Carnegie*, 80 N. Y. 441). The complaint does not disclose any other contractual relations between the plaintiff and the defendant. The debt which the plaintiff is seeking to enforce is not the debt of the defendant, but that of the bank. The only liability that in law is imposed upon the defendant to pay this debt, or any part of it, is created by the statutes of the state where the corporation is domiciled. The principle adopted, generally, by the more recent cases in this state, is that such a liability is not strictly based upon contract, but is created by statute. It is not primary, but secondary, and conditional upon the failure of the corporation itself which owes the debt to pay it. A liability is imposed by statute upon the defendant to pay + the corporate debts to a limited extent, under certain circumstances and upon certain conditions. It is not a general liability, but special, and conditioned upon the failure of the corporation itself to pay. This peculiar liability has been held by our courts to place the stockholders of the corporation in the relation of sureties or guarantors of the corporate debts, and the obligation is limited, in the first place, by the defendant's holdings in the corporation, and in the second place by + the deficiency existing after the application of all the property of the corporation to the payment of its debts. It does not appear from the statements of the complaint that the corporate property which passed into the hands of the receiver has yet been marshalled or appropriated for the benefit of creditors. It does appear that a part of it has, but as to how much, if any, still remains in the hands of the receiver applicable to the discharge of the obligations held by creditors the complaint is silent. True, there is the allegation that the corporation is insolvent and has not sufficient property to discharge its debts. But until all the property of the corporation in the hands of the receiver has been appropriated to that purpose it cannot be known what the deficiency is which the stockholders are required to make up. If the defendant should pay the plaintiff's debt in this action, for aught that appears some one may still be entitled to a dividend from the receiver on account of it, and until it has been definitely ascertained by some proceeding, legal or equitable, either in the courts of the state where the corporation was domiciled or here, what the deficiency is, it is impossible to say with any degree of accuracy how much the defendant ought to pay. The relations of the defendant as a stockholder of the corporation are fixed and governed by the laws of the state in which the corporation is domiciled and under which it was created. If those laws created a liability + against the defendant upon certain conditions and under certain circumstances, they also provided a special and peculiar remedy; and the general trend of authority is to the effect that the remedy thus provided must be followed, and the proceedings for its enforcement must be within the local jurisdiction and by the judicial department of the

sovereignty which enacted the law and created the corporation; and this would be so whether the liability is penal in its nature or arises from the implied obligation of defendant by the purchase of stock.

But if, under any circumstances, the action could be maintained in this jurisdiction, it must be in such a form and by such modes of procedure as like liabilities created under our own statutes are enforced against our own citizens.

There is no reason why the plaintiff should be permitted to enforce his debt in this jurisdiction against a citizen of this state in a form of action different from that which a creditor of a domestic corporation may prosecute against a domestic stockholder. It is quite well established that in a case like this an action at law by a single creditor against a single stockholder for the recovery of a specific sum of money cannot be maintained in our courts under our statutes declaring the liability of stockholders. In such cases the liability must be enforced in equity in a suit brought by or in behalf of all the creditors against all the stockholders, wherein the amount of the liability and all the equities can be ascertained and adjusted. The stockholders of this Kansas bank are not equitably liable for any greater sum than may be necessary to discharge the debts after the corporate property has been applied. All of them that are solvent should contribute in proportion to the amount of their holdings of stock. We are not informed by the complaint how many stockholders there are, or even the amount of the capital stock. Nor are we informed whether any of the stockholders are insolvent. It is quite evident, therefore, that the equitable proportion of the corporate debts which this defendant should pay cannot be ascertained or determined in this action. The liability of the stockholders is a fund to which all the creditors are entitled to resort after the corporate property has been applied upon the debts. If this action can be maintained it is quite apparent that one creditor may collect his debt in full and another creditor may not be paid anything, except what he is able to collect from the corporation. The statutes upon which this action is based provide, among other things, that when judgment is obtained against a stockholder and it is satisfied by collection or payment he may, in turn, maintain an action against all the other stockholders, who are such at the time of dissolution, for the recovery of the portion of the debt for which they were liable, and if any stockholder thus sued shall not have property enough to satisfy his portion of the claim the deficiency shall be divided equally among the remaining stockholders and collected accordingly. It is quite apparent that the purpose of the law cannot be carried out, except by a proceeding in equity for an accounting, to which all the stockholders are made parties. If the plaintiff can maintain this action and collect his debt from the defendant, how can the defendant proceed against his fellow-stockholders to reimburse himself for that part of the debt which they should have paid? It would be manifestly unjust and unfair to compel him to pay this claim and turn him over to another action, perhaps in another state, or in many states,

in order to obtain the contribution which the law evidently contemplates. All these questions should be settled in one proceeding, or in one action, and that at the domicile of the corporation. The statute contemplates that each stockholder shall pay his just proportion of any sum that may be required to discharge the outstanding obligations of the corporation. The form of the action should be one, therefore, adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of contribution. The liability is not to any individual creditor, but for contribution to the fund + out of which all creditors are to be paid alike. Hence the appropriate remedy is by suit in equity to enforce the contribution, and not by + one creditor alone to appropriate to his own use that which belongs to others equally with himself. (*First Nat. Bank v. Dillingham, supra*; *Terry v. Little*, 101 U. S. 216; *Hornor v. Henning*, 93 U. S. 228.) It is impossible to conceal from ourselves that such is the scope and real purpose of the action, and hence we are asked to enforce a remedy under a foreign law where it is perfectly apparent that complete justice cannot be done, and where it is plain that an equitable result can be accomplished only by the courts of the jurisdiction where the corporation was created.

The case has thus far been considered with reference to the discovery of some practical method of applying in this jurisdiction the peculiar local remedy for the enforcement of the statutory liability created by the law of the domicile. There is still another aspect of the question which deserves attention, and it must be viewed in the light of notorious facts which, though not appearing in the record, are matters of current history and common knowledge to which we cannot shut our eyes. Within recent years numerous business enterprises have been promoted in some of the western states, the money for the prosecution of which has been to a large extent borrowed here, either in the form of direct loans upon some kind of security, or by inducing many of our citizens to purchase stock in corporations organized for the purpose under local laws. Much of these investments, amounting to a vast sum in the aggregate, has been lost. This result is in some degree to be attributed to financial depression and the consequent derangement of business, but in a much greater degree to the gross mismanagement and dishonesty of the managers and promoters. The funds thus procured have been used largely in furtherance of local and private interests, and in disregard of every prudent safeguard for the protection of the investors, and sometimes in defiance of every principle of common honesty. In some cases, when the managers well knew they were hopelessly involved, they continued to transact business, borrowing recklessly and pledging the assets in their possession or under their control. When the crash came these assets were sold by the pledgees, and, of course, sacrificed in many cases, leaving large deficiencies, which honest and prudent management could have converted into a surplus. A careful investigation of some of the disastrous failures of

loan, investment, trust, land and mortgage companies, as well as banks and other corporations, will reveal this condition of things. It will not be difficult for speculators to purchase large claims against these defunct corporations at a very low price if they can be readily enforced here against stockholders who have made and lost investments in the stock.

These considerations are not, of course, pertinent in a case where a party is seeking to enforce a clear legal right, whatever may have been the circumstances of its origin, but they serve to stimulate a careful inquiry as to the principles and reasons upon which the courts of this state are required to aid in the enforcement of claims of this character.

In the case at bar the plaintiff's right of action has no other legal or moral basis than the *flat* of a legislature of another state. It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, *ex proprio vigore*, no force or effect in another. The enforcement in our courts of some positive law or regulation of another state depends upon our own express or tacit consent. The consent is given only by virtue of the adoption of the doctrine of comity as part of our municipal law. That doctrine has many limitations and qualifications, and generally each sovereignty has the right to determine for itself its true scope and extent. The courts of this state are open to all suitors to enforce rights of action, transitory in their nature, recognized by the common law or founded in natural justice, and when no law of the forum or any principle of public policy interferes. There is, however, a large class of foreign laws and statutes, which, under the doctrine of comity, have no force in this jurisdiction. It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects. It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women, as well as the local Statute of Frauds and statutes authorizing distress and sale for non-payment of rent, are not recognized in another jurisdiction under the principles of comity. (*Morgan v. Neville*, 74 Pa. St. 52; *Waldron v. Ritchings*, 3 Daly, 288; *Seigel v. Robinson*, 56 Pa. St. 19; *Kelly v. Davenport*, 1 Browne [Pa.], 231; *Ross v. Wigg*, 34 Hun, 192; *Ludlow v. Van Rensselaer*, 1 John. 95; *Skinner v. Tinker*, 34 Barb. 333.) It is well understood also that the statutes of one state giving a right of action to recover a penalty have no force in another. (*Huntington v. Attrill*, 146 U. S. 657.) So also rights of action arising under foreign bankrupt, insolvent or assignment laws, are not recognized here when prejudicial to the interests of our own citizens. (*Warner v. Jaffray*, 96 N. Y. 248; *In re Waite*, 99 N. Y. 433; *Barth v. Backus*, 140 N. Y. 230; *Douglass v. P. Ins. Co.*, 138 N. Y. 209.) There is another class of cases where the right to enforce the foreign statute is conditioned upon the existence of a law substantially similar here. (*Wooden v. W. N. Y. & P.*

R. R. Co. 126 N. Y. 10.) Statutes giving a right of action for negligence resulting in death belong to that class. (*Whitford v. Panama R. R. Co.*, 23 N. Y. 465.) There are many other classes of foreign statutes affecting public and private interests which courts have uniformly held can have no extra-territorial force or effect. From the general trend of judicial decisions in this country, and the consensus of authority on the question, it may be safely asserted that rights of action, such as are set forth in the complaint in this action are not enforceable in another jurisdiction upon any obligations of comity. It has been held that an action by a New York creditor of a corporation organized under the Manufacturing Act of this state against a New Jersey trustee in the courts of that state, for neglect to file the annual report, could not be maintained. The opinions of the several members of the court in that case contain a clear and interesting discussion of the law applicable to the question. (*Derrickson v. Smith*, 27 N. J. Law, 166.) The courts of Massachusetts have uniformly refused to entertain actions of this character, upon the ground either that to enforce the foreign law would be injurious to its own citizens, or that complete justice could not be administered in its courts under its special and peculiar provisions. (*Erickson v. Nesmith*, *supra*; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349; *Post v. T. C. & S. L. R. R. Co.*, 144 Mass. 341; *Bank of North America v. Rindge*, 154 Mass. 203.) The arguments of the court in these cases upon which the conclusion was based deserve the highest respect, and it is worthy of notice that in the case last cited the statute sought to be enforced was the identical one now under consideration in the case at bar.

The highest court of Illinois has also refused to enforce this same statute and provision of the Kansas Constitution on the ground that the remedy was special and must be pursued in the state where the corporation exists. (*Fowler v. Lamson*, 146 Ill. 472.) In another case (*Young v. Farwell*, 139 Ill. 326) it held that it could not enforce by action at law a statute of Oregon for the collection of unpaid subscriptions, for the reason that a complete settlement of the controversy required a bill in equity where all the parties interested were before the court, so that complete justice could be meted out to all, and all conflicting rights and equities finally adjusted. (*Patterson v. Lynde*, 112 Ill. 196; 106 U. S. 519.) By the Constitution and laws of Michigan stockholders of corporations of that state are individually liable for certain debts to be enforced by action of assumpsit, and the highest court of Wisconsin has held that the remedy was exclusive; that the corporation itself was a necessary party and that the liability could be enforced only in the courts of Michigan. (*May v. Black*, 77 Wis. 101.) It has been also held, after exhaustive consideration, that a creditor of an Ohio corporation could not enforce the statutory liability of a stockholder in the courts of West Virginia. (*Nimick v. Mingo Iron Works Co.*, 25 West Va. 184.) There are numerous other decisions in the state and Federal courts that hold in effect, either that such a liability cannot be

enforced at all beyond the local jurisdiction, or that such an action must be in equity after all remedies against the corporation have been exhausted, and that too in the state where the stockholder is sought to be charged, or at least the bill must show upon its face by proper allegations that such a proceeding was impossible, and that all the corporate assets have been applied to the payment of the claims of creditors. (*Terry v. Little*, 101 U. S. 216; *National Tube Works Co. v. Ballou*, 146 U. S. 517; *Pollard v. Bailey*, 20 Wall. 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Peck v. Miller*, 39 Mich. 594; *Barrick v. Gifford*, 47 Ohio St. 181; *Allen v. Walsh*, 25 Minn. 543; *Smith v. Huckabee*, 53 Ala. 191.) The decisions of our own courts are also to the effect that special remedies provided by foreign laws to enforce the liability of stockholders in foreign corporations must be applied by the courts of the state in the local jurisdiction and where the corporation is domiciled. (*Lowry v. Iuman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97; *Barnes v. Wheaton*, 80 Hun, 8.) The statutes in these cases were, it is true, different in some respects from that now under consideration, but when these cases are read with some of our more recent decisions as to the mode of enforcing the liability of stockholders in our own corporations, it becomes at once apparent that they apply to the statute in question. (*First National Bank of Auburn v. Dillingham*, 147 N. Y. 603.)

The objection to this action does not rest upon the principle that the plaintiff is seeking to enforce a statute for the recovery of a penalty, since the liability is not penal in any international sense, but arises upon the statute as an implied obligation which the defendant assumed when he purchased his stock. (*Cochran v. Wiechers*, 119 N. Y. 399; *Flash v. Conn.* 109 U. S. 371; *Richmond v. Irons*, 121 U. S. 27.) The case involves questions which open a broad field for investigation. It would take much time and labor to explore it thoroughly. It would, perhaps, be impossible to state the principle upon which the decision should rest without apparently coming in conflict with some of the numerous cases on the subject at some point. The great weight of authority, as will be seen, is against the right to maintain such an action. Sometimes the decision is put upon one ground and sometimes upon another, but it is to be noticed that the party seeking to enforce such a statute in a foreign jurisdiction has been quite uniformly defeated. The statute in question, while creating a certain liability on the part of a stockholder to a creditor of a corporation, at the same time gives to the former certain rights as against his fellow-stockholders for contribution. It should be administered in such a way as to secure the rights of all in the same action. This is the interpretation which we have given to our own statutes enacted for a similar purpose. It is clear that this cannot be done in this action since the theory of the plaintiff is that the defendant is liable in successive actions at law by creditors, suing separately, until he has paid a sum equal to his stock, and then he must resort to some other jurisdiction for contribution. This

would be most unjust and oppressive, and it is safe to say that no well-considered case can be found that sanctions such a principle.

While this is not an action for a penalty, yet we think that it belongs to a class of cases in which there is no obligation under any well-recognized principle of the law of comity to enforce a claim founded upon such a statute. Moreover, the right asserted and the remedy provided are of such a nature that they cannot be given any practical effect here without injustice to our own citizens. We are virtually asked to ignore our own rules of construction and methods of procedure in order to compel the defendant to pay to foreign creditors a sum equal to his holdings of stock, without any power to inquire into the necessity for it by an accounting or to secure to him any recourse against others equally liable. When the courts of this state are asked to administer the statutes of Kansas and we can see that the case is surrounded by such complications and the circumstances are such that it cannot be done without injustice to our own citizens, or that it will be impossible to do full and complete justice to all the parties in interest, it is reasonable and just to decline to administer them at all.

The judgment of the General and Special Terms should be reversed, with costs in all courts, and the demurrer sustained, with leave to the plaintiff to amend the complaint on payment of costs.

All concur.

Judgment accordingly.

" May 1

CHAPTER XX.

POWER OF CORPORATION TO BECOME A MEMBER OF A
COPARTNERSHIP OR TRUST.

WHITTENTON MILLS v. UPTON.

1858. 10 *Gray (Mass.)*, 582.¹

PETITION by a manufacturing corporation to set aside proceedings in insolvency, instituted against the corporation and William Mason, as partners, upon Mason's petition; also to restrain the assignees appointed under those proceedings from further interfering with their estate; and to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations.

The following facts appeared by the report of a special master in chancery:

The Whittenton Mills were incorporated by *Statute* 1836, Chapter 19, for the purpose of manufacturing cotton goods. Before 1850, an agreement of copartnership was entered into between the Whittenton Mills and W. Mason. This partnership, under the firm name of William Mason & Company, carried on an extensive business in the manufacturing of machinery for cotton mills; afterwards adding the business of manufacturing locomotive engines. Mason contributed to the copartnership nothing but his skill and patent rights. The Whittenton Mills contributed all the capital required. In 1857 the Whittenton Mills, which had continued the business of manufacturing goods, and the said firm of William Mason & Company, both became insolvent. Prior to that time the general agent of the Whittenton Mills represented to third persons, with whom the firm of William Mason & Company were dealing, that the corporation was a member of the partnership. The nature of the business in which Wm. Mason & Co. were engaged, and the manner of conducting it, were throughout known to all the officers of the corporation; and to all the stockholders except one, who was the owner of four shares from the time of the organization until 1854, when he transferred them to one of the other stockholders.

¹ Statement abridged. Portions of arguments omitted. — Ed.

S. Bartlett, and *B. R. Curtis*, for the petitioners. 1. A manufacturing corporation, created by a law of this State to carry on business therein, pursuant to the Rev. Sts. cc. 38, 44, cannot enter into a general copartnership with either a natural person or another corporation, even for the prosecution of the same business for which it was chartered. The powers of a corporation are only those expressly granted, and those implied, because needful, or, perhaps, usual and customary, for the ends which the corporation was created to attain. *Salem Milldam v. Ropes*, 6 Pick. 32. *Beatty v. Knowles*, 4 Pet. 166. *Angell & Ames on Corp.* §§ 229, 239, 256. The power to form a general copartnership is neither expressly granted, nor needful to transact the business of manufacturing.

The entire legislation of the State for the regulation of manufacturing corporations proceeds upon the assumption that each corporation will conduct its own several affairs separately, by means of its own duly appointed officers and agents, acting in the name and behalf of the corporation; and its interests and affairs cannot be committed to a partnership, and conducted under the rules and principles which govern partnership business and liability, without violating the public policy of the State, exhibited by its legislation, and removing the safeguards erected for the security of those who may become creditors of the corporation. Rev. Sts. c. 38, §§ 1, 2, 22, 25. In a partnership, the individual partner, (in this case *Mason*,) might do anything, within the scope of the business, not only without the concurrence of the directors, but against their will.

[Remainder of argument omitted.]

E. R. Hoar, and *H. Gray, Jr.*, for the assignees. 1. A corporation has the same power as a natural person to make all contracts not prohibited by law, and which are necessary or usual in transacting the business which it is authorized by law to transact. The power to make a contract of partnership is not a distinct corporate power, to be created or conferred only by a special grant; but, like the appointment of an agent—and each partner is, as between themselves, an agent of the other—is only one mode or instrumentality of effecting the lawful objects for which the corporate powers were given. A corporation therefore may form a contract of copartnership to effect any purpose which it may lawfully accomplish by other means, agencies, or instrumentalities. *Angell & Ames on Corp.* §§ 95, 96, 271, 272. *Canal Bridge v. Gordon*, 1 Pick. 304, 307. *Peckham v. North Parish in Haverhill*, 16 Pick. 287. *Old Colony Railroad v. Evans*, 6 Gray, 38, 39. *Catskill Bank v. Gray*, 14 Barb. 479. *Catskill Bank v. Hooper*, 5 Gray, 584, 585. *Conkling v. Washington University*, 2 Maryland Ch. 508. *Shrewsbury & Birmingham Railway v. London & Northwestern Railway*, 17 Ad. & El. N. R. 663, 665, 2 Macn. & Gord. 353, and 6 H. L. Cas. 135. *Great Northern Railway v. South Yorkshire Railway & River Dun Co.* 9 Exch. 642.

This case falls within the principle upon which congress has been

held to have the power to incorporate a bank, although no such power is expressly granted, and the Constitution declares that all powers not delegated are reserved. 1 Kent Com. (6th ed.) 249-254.

The Whittenton Mills are shown to have made and acted under agreements of copartnership with William Mason. "Trading corporations are affected, like private persons, with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally, by those legal and equitable considerations, which affect the rights of natural persons." *Melledge v. Boston Iron Co.* 5 Cush. 175.

[Remainder of argument omitted.]

THOMAS, J. This is a petition to this court, sitting in equity, and as such having, by the *St.* of 1838, c. 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated, if the corporation was capable in law of entering into and forming such partnership and for such ends.

But the petitioners say, first, that the Whittenton Mills could not enter into any legal partnership; secondly, that if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created; thirdly, that if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason and under the *St.* of 1838, c. 163, and the acts in addition thereto; such acts respecting only natural persons and making no provision for bodies corporate.

At the threshold of the cause and of its elaborate discussion is the question, Was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: Has a corporation, as one of its usual inherent powers, the capacity to form a contract of copartnership? The narrower question, but for this case the practical and pertinent one, is, Can a manufacturing corporation in this commonwealth, incorporated since February, 1831, and subject to the provisions of the thirty-eighth and forty-fourth chapters of the revised statutes, enter into a contract or society of copartnership?

This corporation was created in March, 1836, as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges, and made subject to all the duties, restrictions, and liabilities set forth in the thirty-eighth and forty-fourth chapters of the revised statutes, passed on the fourth of November preceding, but not to take effect till the first of May, eighteen hundred and thirty-six. *St.* 1836, c. 19. This charter, with the provisions of the chapters referred to

and made part of it, is the origin and source of the powers and functions of the corporation. What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If then this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of c. 38 of the Rev. Sts. provides that the business of every such manufacturing corporation shall be managed and conducted by the president and directors thereof, and such other officers, agents, and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company and to bind the corporation by his acts is vested in one not a member of the corporation nor its officer or agent. Such are the third, fourth, and fifth sections, providing how the president and directors, and other officers, agents, and factors of the corporation shall be chosen. Such too is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the limit fixed by law, or to reduce it. §§ 9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation; the means of stating which would not be in their power if another principal had the power of creating the debts. § 22. Of the same character is the twenty-fifth section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess; a provision evidently based upon the ground that the exclusive power to contract

debts is vested in such directors, and that they cannot be divested of it, and which is wholly inconsistent with the existence of a power in the corporation to enter into a contract of partnership, by which another principal would be created, having equal power to contract debts and to bind the partnership and the corporation *in solido*.

Indeed the effect of all our statutes, the settled policy of our legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a manufacturing corporation under the legislation of the Commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the *St.* of 1852, c. 195, not adverted to in the argument, corporations created for the manufacture of woollen and cotton goods are authorized to carry on certain other manufactures, but this only when four fifths of the stockholders shall, by vote at a special meeting called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered, did not exist before the statute was passed.

We are therefore all of opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void.

It is said however by the respondents that if this be so, such violation of the charter can only be alleged by the Commonwealth upon proceedings for a forfeiture of the charter, and that the validity of the partnership cannot be called in question by the corporation or by its creditors or debtors.

As the basis of proceeding against the Whittenton Mills in insolvency upon the petition of Mason under the *St.* of 1838, c. 163, § 21, even supposing that the provisions of that statute are not limited to natural persons, it was necessary to show the existence of an actual

copartnership between Mason and the corporation. It was not sufficient to show that they had so conducted as to be liable to third persons as partners; they must be partners *inter sese*. *Hanson v. Paige*, 3 Gray, 239. There must be a contract of copartnership between them. Into such a contract the petitioners were incapable of entering.

But the case rests upon broader grounds. The charter of the corporation is part of the public law. Rev. Sts. c. 2, § 3. Those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership; that that contract was beyond the scope of its authority, and that this incapacity resulted from considerations not personal or peculiar to this corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and, while it imposes upon the stockholders of the corporation heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs.

The precise point at issue before us is the validity of these proceedings in insolvency. That depends, as before remarked, upon the existence of the partnership between the Whittenton Mills and Mason. Upon that only could the petition of Mason be sustained.

It is not necessary for this purpose to decide how far these considerations will affect those claiming to be the creditors or debtors of the alleged partnership. It is in this point of view only, that the cases of *Chester Glass Co. v. Dewey*, 16 Mass. 94, *Quincy Canal v. Newcomb*, 7 Met. 276, and *White v. South Shore Railroad*, 6 Cush. 412, can be deemed material. They have the tendency to show the existence of a contract between the Whittenton Mills and Mason, which the former is estopped to question.

In the case of *Chester Glass Co. v. Dewey*, one ground of defence to the recovery for goods sold and delivered by the plaintiff corporation was, that the corporation was prohibited from trading. The court held, that the legislature did not intend to prohibit the supply of goods to those employed in the manufactory. That certainly was the end of the matter. The court however added, that the defendant could not refuse payment on this ground, but that the legislature may enforce the prohibition by causing the charter to be revoked. This suggestion will be entitled to consideration if a question should arise as to the right of the alleged company to recover for goods sold, but it certainly is not conclusive upon the relation of the partners *inter sese*.

In *Quincy Canal v. Newcomb*, it was held, that, where a canal was opened and toll claimed and the defendant used the canal, he was liable to the payment of such toll and could not avoid such payment by showing that the canal had not been made so deep as the statute required.

In *White v. South Shore Railroad*, it was held, that the defendants

were liable for damages in constructing their road through and across a mill pond authorized by the general court to be raised in a navigable river, though in erecting the dam for raising the pond the condition of the act permitting it had not been complied with. The court said, that the railroad company could not take the petitioners' pond from them because the dam was not constructed in compliance with the act; that whether it had been so constructed was a matter between the government and the petitioner.

If the assent of all the stockholders were shown to the formation of the partnership — which is not the fact — it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provision of the insolvent law of 1838, c. 163, and the acts in addition thereto.

The proceedings in insolvency founded upon the petition of Mason as the partner of said Whittenton Mills under the firm of William Mason & Company were illegal and must be vacated and set aside, so far as they affect the estate of the Whittenton Mills. A mandamus must issue to the judge in insolvency for the county of Bristol to proceed upon the petition of the Whittenton Mills, to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

BATES v. CORONADO BEACH CO.

1895. 109 *California*, 160.¹

APPEAL by the Coronado Beach Company from a judgment of the Superior Court of San Diego County.

The plaintiff brought this action against the defendant for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate.

The facts as found by the Court were substantially as follows:

The plaintiff and the appellant entered into a contract by which it was agreed that they should purchase certain lands and other property from the Millers, sell the same, pay certain debts and encumbrances

¹ Statement compiled from opinion in this case and from opinion in previous report of same case under the name of *Bates v. Babcock*, 95 *Calif.* 479. Only so much of the opinion is given as relates to a single point. — ED.

thereon, and divide the profits and losses arising therefrom equally between them. Both of the parties to the agreement immediately entered upon its performance, and carried it out according to its terms. The plaintiff gave to the defendant the fifteen thousand dollars which was his contribution to the venture, and transferred the title to the land then held by him [as trustee for the Millers] to the person designated by the defendant [one Hubbell, secretary of the Coronado Beach Company], and the defendant disposed of the money in discharging obligations upon the land, and afterward disposed of the land. One purpose for which the Coronado Beach Company was incorporated was the selling or otherwise disposing of lands.

In the Superior Court judgment was rendered against the Coronado Beach Company.

Gibson & Titus, for appellant.

Clarence L. Barber, and *J. W. Hughes*, for respondent.

HARRISON, J.

It was not *ultra vires* for the appellant to enter into the agreement with the plaintiff. The power of a corporation to enter into a general partnership with an individual, or with another corporation, is not here involved. The ground upon which this power is sometimes denied is that a partnership implies the power of each partner, under his authority as a general agent for all the purposes of the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation exists require its powers to be exercised by a board of directors, and preclude it from becoming bound by the act of the one who may be only its partner. There is, however, in the present case no question of agency in the management of the affairs of the corporation. The plaintiff paid the money to the appellant, and transferred to its appointee the title to the land, so that the entire management of the business contemplated by the contract was intrusted to the corporation itself. There is no rule of law that will preclude a corporation from entering into a contract with an individual, which will have the effect to carry out directly or indirectly the object of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties. Section 354 of the Civil Code provides: "Every corporation, as such, has the power: . . . 8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation."

[Remainder of opinion omitted.]

Judgment and order affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

PEOPLE v. NORTH RIVER SUGAR REFINING CO.

1890. 121 *New York*, 582.¹

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court, and affirmed an order denying a motion for a new trial.

This action was brought by the attorney-general to have the defendant "dissolved, its charter vacated and its corporate existence annulled."

The complaint alleged, and it was found, that defendant is a corporation organized under the General Manufacturing Act; that it, together with other corporations engaged in the business of sugar refining, in violation of law and in abuse of its powers, became a party to and carried out a certain agreement. Some of the material features of this agreement are, in substance, as follows:

All the shares of the capital stock of all the corporations shall be transferred to a board consisting of eleven persons.

In lieu of the capital stock of each corporation, certificates not exceeding \$50,000,000 shall be issued by the board, and allotted in certain proportions to the respective corporations. 15 per cent of the certificates thus allotted to each corporation shall be left with the board; the remaining 85 per cent shall be divided among the former stockholders in proportion to the amount of stock formerly owned by each.

The board of eleven persons, holding all the stock of all the corporations, may transfer shares to persons whom it may desire should be constituted directors of such corporations.

The several corporations shall maintain their separate organizations, and each shall carry on and conduct its own business.

The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends, shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock.

No action shall be taken by the board which shall create liability by it or by its members.

The certificates retained by the board (15 per cent of the entire issue) shall be subject to be disposed of by the board either for the acquisition of other refineries to become parties to this agreement, payment for additional capacity, or by appropriations to the several refineries.

The funds necessary to enable the board to make the payments herein provided to be made by it may be raised by mortgage to be made by

¹ Statement abridged. Arguments and portions of opinion omitted. — ED.

the corporations, or either, any, or all of them, on their property, and by such other means as shall be satisfactory to such board.

Vacancies in the board by expiration of office shall be filled at an annual meeting of the holders of certificates, at which said holders shall vote according to the number of shares for which they hold certificates.

Other facts material to the decision are stated in the opinion.

James C. Carter, and *John E. Parsons*, for appellant.

Charles F. Tabor, Attorney General, and *Roger A. Pryor*, for respondent.

FINCH, J. The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelops great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the State summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

Two questions, therefore, open before us: first, has the defendant corporation exceeded or abused its powers, and, second, does that excess or abuse threaten or harm the public welfare.

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for as an unquestionable truth we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "Board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much, has lessened the supply upon the

market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such control can be secured by the voting power, in that board."

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

On the other hand it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other, vesting the partnership power in a board of control.

I have brought these two theories face to face where they may confront each other, because, when a choice is made between them, we have gone a long distance towards the end of the controversy.

[The learned Judge held, that the transaction was not a sale, but a trust constituted by mutual agreement.]

The combination, therefore, framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

[The learned Judge here recapitulated the facts; which were, in substance, that the stockholders unanimously directed the secretary to sign the agreement in behalf of the corporation; that he accordingly did so sign; that a subsequent vote to revoke this action was ineffective; that, at a later date, the stockholders voted to sell all the stock to John E. Searles, Jr., for \$325,000; that the stock was so conveyed to Searles; and that Searles thereafter conveyed all the stock to the board of eleven persons receiving therefor certificates for \$700,000, deducting the 15 per cent retained by the board. The opinion then proceeds:]

What Searles did with the certificates, we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board; that Searles became President of the corporation; that its share of the regular dividend has been allotted to it for its certificate holders, and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There *was* corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such; a proposition which, if sound, dominates the whole field

of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the State's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the State can put its finger and say, this the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the State may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That again is corporate conduct, though there be an utter absence of directors' resolutions. Is it asked what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed? The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock-books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial, but the legal owners of the stock; and, if the board trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when, beyond that corporate neglect, they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in wilful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees

and directors general authority to manage the stock, property, and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that, would disarm the State in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hand, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in

People ex rel. v. K. & M. T. R. Co. (23 Wend. 193), "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it, was illegal and tended to the public injury, and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "over production." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust which is, in substance and effect, a partnership of twenty separate corporations. The State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people, over-balancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. (*N. Y. & S. C. Co. v. F. Bank*, 7 Wend. 412; *Clearwater v. Meredith*, 1 Wall. 29; *Whittenton Mills v. Upton*, 10 Gray, 596.) The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied.

Indeed, in one of the papers added to the appellant's brief, it is not only admitted but asserted and defended. That paper shows quite clearly, that by force of the arrangement, there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however it may be described, amounts only to a practical consolidation which public policy does not forbid because the statute permits it. (Laws of 1867, chap. 960; Laws of 1884, chap. 367.) The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination.

And here I think we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and

protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the State by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly, or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

CHAPTER XXI.

POWER OF CORPORATION TO OWN SHARES IN ANOTHER CORPORATION.

PEOPLE EX REL. v. CHICAGO GAS TRUST CO.

1889. 130 *Illinois*, 268.¹

APPEAL from Circuit Court of Cook County.

Information in the nature of a *quo warranto*, filed by the Attorney General. The information alleges that, on April 29, 1887, there were four gas companies in Chicago, two of them incorporated by Special Acts, and two under the General Incorporation Law; that the defendant company was organized, April 29, 1887, under the General Incorporation Law; that the defendant company has usurped and unlawfully exercised privileges and franchises not conferred by law, to wit, the privilege and franchise of purchasing and holding a majority and controlling interest of and in the shares of capital stock of each of the said four older gas companies; and has thus destroyed the motive for competition between them; thereby usurping and securing to itself a virtual monopoly in the business of furnishing illuminating gas to the city of Chicago and the inhabitants thereof; to the detriment of the People of the State.

To this information, the defendant company filed eleven pleas. Several of the pleas set out in full all the proceedings for the organization of the company, including a recital of the statement filed with the Secretary of State setting forth the object of the corporation. [This "statement" is summarized in the opinion of the Court, *post*.] Several of the pleas admit that the defendant company has purchased and now holds a majority of the capital stock of the four older gas companies; and said pleas undertake to justify such purchases as among the powers lawfully conferred upon the defendant company by the State.

The Attorney General demurred to the eleven pleas. The court below overruled the demurrer. An appeal was taken.

George Hunt, Attorney General, and *James K. Edsall*, for appellants.
Goudy, Green & Goudy, for appellee.

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

MAGRUDER, J. The Chicago Gas Trust Company, appellee herein, was organized under the General Incorporation law of this State. The Statement filed by the original incorporators with the Secretary of State sets forth that the Trust Company was formed for two objects, or for one object of a two-fold character. The object, named in the first clause of the second specification of the "Statement," is, in brief, the erection and operation of works in Chicago, and other places in Illinois, for the manufacture, sale, and distribution of gas and electricity. The object named in the second clause of the second specification of the "Statement," is, in brief, "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago or elsewhere in Illinois.

In this proceeding no attack is made upon the validity of the organization of the Gas Trust Company as a corporation. That it was formed in strict conformity with the requirements of the general Incorporation law is not denied by the People. Nor does the State here question the right of the appellee company to acquire and operate works for the manufacture and sale of gas and electricity in pursuance of the object designated in the first clause above mentioned. Hence, the controversy arising upon the demurrer to the pleas in this case is not as to the right of appellee to exist as a corporation, nor as to its right to exercise the first one of the powers sought to be conferred upon it by its charter.

The controversy presented by the record relates solely to the authority of the appellee to carry out the object designated in the second clause above mentioned. (It is claimed on the part of the People, that the charter or articles of association of the Gas Trust Company did not and could not confer upon it the power "to purchase and hold . . . the capital stock" of other gas companies.) It is averred in the information, and admitted in eight of the eleven pleas, that appellee has purchased and now holds a *majority* of the shares of the capital stock of four gas companies, to wit: The Chicago Gas Light and Coke Company, The People's Gas Light and Coke Company, The Equitable Gas Light and Fuel Company, and The Consumers' Gas Company; and it is admitted in three of the pleas, that the appellee has purchased and now holds *some portion* of the capital stock of said four companies.

The information charges that, by so purchasing and holding a majority of the shares of the capital stock of each of the four companies, the appellee usurps and exercises "powers, liberties, privileges, and franchises not conferred by law." The appellee pleads in justification, that the power so to purchase and hold the stock is granted by the terms of its charter.

Can the Chicago Gas Trust Company lawfully purchase and hold the stock of other gas companies?

There are two views, which may be taken of the power to purchase and hold the capital stock of other gas companies as designated in said

second clause. Must it be regarded as an original, independent power intended to exist exclusively of and in addition to the power named in the first clause, or may it be considered as merely ancillary to the other power of maintaining and operating works for the manufacture and sale of gas? If the latter view be correct, the main object, for which the Gas Trust Co. was formed, would be that it might itself maintain and operate works for the manufacture and sale of gas, while the purchase of shares of stock in other companies would be merely a subordinate object, incidental only to the main purpose of the corporate formation. An illustration of this idea may be found in the general Law of this State in regard to Life Insurance Companies, which makes it lawful for a Life Insurance Company organized in the State to "invest its funds or accumulations in the stocks of the United States . . . or in such other stocks and securities as may be approved by the Auditor." The main object of forming such a company is to engage in the business of Life Insurance, but the power to invest surplus funds in certain stocks is given as an incident to such business.

Can the power to purchase and hold the stock of other gas companies be lawfully exercised by the appellee as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas?

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms, or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation. (*C. P. & S. W. R. R. Co. v. Marseilles*, 84 Ill. 643; *Chicago Gas Light Co. v. People's Gas Light Co.* 121 id. 530.) An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. (*Hood v. N. Y. & N. H. R. R.* 22 Conn. 1; *Franklin Co. v. Lewiston Savings Institution*, 68 Maine, 43.)

Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. "The right of a corporation to invest in shares of another company cannot be implied because both companies are engaged in a similar kind of business." (1 Morawetz on Priv. Corp. sec. 431.)

It is true that a gas company might take the stock of another corporation in payment of a debt, or perhaps as security for a debt, but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specifically granted power to operate

gas works and manufacture gas. Some corporations, like insurance companies, may find it necessary to keep funds on hand for the payment of losses by death or fire, or to meet other necessary demands, but it is questionable whether even these can invest their surplus funds in the stocks of other corporations without special legislative authority. But there is nothing in the nature of a gas company, which renders it proper for such a company to accumulate funds for outside investment; its surplus profits belong to the stockholders, and, when distributed among them, can be used by them as they see fit.

If, then, the power to purchase outside stocks cannot be implied from the power to operate gas works and make and sell gas, a company, to whom the latter power has been expressly granted, cannot exercise the former without legislative authority to do so. This is the law as settled by the great weight of authority.

Boone on the Law of Corporations says: "Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter." In Green's Brice's *Ultra Vires* (page 91, note b) it is said: "In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it." So also Morawetz on Private Corporations (secs. 431, 433) says: "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. . . . A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools." The authorities referred to by these text writers sustain the conclusions announced by them. It has been held in many cases, that, "in the United States, corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law," and that "one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute." (*Franklin Co. v. Lewiston Sav. Ins. supra*; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Milbank v. N. Y., L. E. & W. R. R. Co.* 64 How. (N. Y.) 20; *Sumner v. Marcy*, 3 W. & M. 105; *Mut. Savings Bank v. Meriden Agency*, 24 Conn. 159; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah R. R. Co.* 43 id. 13; *Berry v. Gates*, 24 Barb. 199.)

The special charters of the Chicago Gas Light and Coke Co. and of the People's Gas Light and Coke Co., which are set out in full in the information and not called in question in any of the pleas, confer, by express grant, the power to erect gas works and manufacture and sell gas, etc., but do not confer the power to buy shares of stock in other companies; upon the latter subject they are silent. It will not be denied, that, under the authorities already cited, these two com-

panies cannot buy and hold stock in other gas companies. The same would undoubtedly be admitted to be true of the Chicago Gas Trust Company, if it held under a special charter of like tenor and effect granted before the adoption of the constitution of 1870. Does it make any difference that the appellee was organized under the general incorporation Act?

The general incorporation Act of this State does not, in express terms, confer upon the corporations organized under it the power to purchase and hold shares of stock in other corporations. It is silent upon that subject. The only powers granted by it are the ordinary corporate powers, such as the rights to be bodies corporate and politic, to sue and be sued, to have a common seal, etc. The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place. (1 Morawetz on Priv. Corp. sec. 318.) The provisions of the law enter into and form a part of the charter. It certainly cannot be true, that a corporation, formed under the general incorporation Act for a purpose other than that of dealing in stocks, can exercise the power of purchasing and holding stock in other corporations, where such power cannot be necessarily implied from the nature of the power specifically granted, and is not necessary to carry the latter into effect.

The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the Statement filed with the Secretary of State? We think not. The action of the Secretary or State in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial. (*Oregon Ry. Co. v. Oregonian Ry. Co.* 130 U. S. 1; 4 Am. & Eng. Ency. of Law, Tit. Corporations, page 192, note 1.) Whether the articles of association, consisting of the Statement, the License, the Report of the Commissioners, the Certificate of Organization, etc., do or do not confer such rights and powers as are authorized by the law, is a matter for judicial determination. Counsel for appellee say: "We do not claim, of course, that the action of the Secretary of State is conclusive and not subject to review by this court," etc.

The question whether or not the power to purchase stock is a lawful purpose under section one of the Incorporation Act, which provides that "corporations may be formed in the manner provided by this act *for any lawful purpose*," does not arise under this branch of the discussion. It will be pertinent when we come to consider the right to buy and hold stock, as an original and independent power, or object of formation. It is not denied by the appellant, that the organization of appellee for the purpose of erecting gas works and making and selling

gas, is an organization for a lawful purpose. Viewing that as the main purpose for which appellee was formed, the incorporators could not tack on and connect with such main purpose the power to buy and hold stock in other gas companies by merely describing such power in the Statement. To hold, that they could confer such power by writing it down in the Statement, would be to hold that the General Assembly could clothe them with a part of its legislative functions.

When a corporation is formed under the general incorporation act for the purpose of carrying on a lawful business, the law, and not the Statement, or the License, or the Certificate, must determine what powers can be exercised as incidents to such business. Even if shares of stock be regarded as personal property, as claimed by counsel for appellee, section five (5) of the general law provides, that corporations formed under it "may own . . . so much . . . personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation, . . . and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." This language negatives the idea that a corporation formed under the general law can exercise the power of buying and holding the stock of other companies. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business. Hence, it is forbidden to own such stock, the same being "personal estate."

The language of the Act, as thus quoted, expressly restricts the powers of a corporation organized under it to such powers as are necessary and requisite to carry into effect the object for which it was formed. We have already seen, that, where the object of forming a gas company is to engage in the business of making and selling gas, the purchase of stock in other companies is not necessary to carry such object into effect. Therefore, the general incorporation Act not only does not expressly authorize the purchase of such stock, but impliedly forbids it in cases where the main purpose of the corporate creation is other than the purchase and sale of stocks.

It has been held, that the powers obtained by corporations organized under general laws are necessarily restricted to those mentioned in the act (*Medical Coll. Case*, 3 Whart. (Pa.) 445); that, in such cases, the charter is void as to all powers and privileges granted beyond the provisions of the statute (*Heck v. McEven*, 12 Lea, (Tenn.) 97); that, if unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void (*Eastern Plank R. Co. v. Vaughan*, 14 N. Y. 546); that anything in such articles not warranted by the statutes, authorizing the formation of corporate bodies, is void for want of authority (*Oregon Ry. Co. v. Oregonian Ry. Co.* 130 U. S. 1); and that such articles must be construed strictly, and against the grantee and in favor of the government or the general public. (*idem.*)

Our conclusion upon this branch of the case is, that, if the Chicago

Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas works and manufacturing and selling gas, it has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation.

We come now to the second view of the right to purchase and hold the stock of other companies. . . .

[The defendants] plead the right to so purchase a majority of said shares as an original and independent power or franchise without reference to the other power of making and selling gas.

[The Court then considered the justification founded on the second clause in the "statement" of the purposes of incorporation; viz., the purchasing and holding of the capital stock of other gas companies, or the purchasing, leasing or operating the plant and franchises of any gas or electric companies. It was held, that the effect of such purchases would be to create a monopoly and to relieve the other companies of their legal obligations; that the purpose aimed at was not a lawful purpose; that no corporation can be formed under the General Incorporation Law except for a lawful purpose; and that a corporation formed under the General Law cannot clothe itself with an unlawful power merely by naming such power as one of its objects in the articles filed with the Secretary of State. Hence it was decided, that the acts of the defendant company could not be justified under the second clause in the "statement"; and that the court below erred in overruling the demurrers to the pleas.]

Judgment reversed.

JOINT STOCK DISCOUNT CO. v. BROWN.

1866. *Law Reports, 3 Equity Cases*, 139.¹

THIS was a demurrer.

The bill was filed by the *Joint Stock Discount Company, Limited*, by its official liquidator, against *William Charles Brown* and fourteen other persons, late the directors, secretary, and assistant manager of the company, stating its incorporation on the 21st of February, 1863, with a memorandum and articles of association, the former of which contained the following clause:—

3. "The objects for which the company is established are the carrying on the business of a bill-broker and scrivener; the drawing, accepting, endorsing, discounting, and re-discounting bills of exchange

¹ Statement abridged. Argument and portions of opinion omitted.—Ed.

and promissory notes; the making advances and procuring loans on, and the investing in, securities; the borrowing and lending of money; the guaranteeing payment of bills of exchange, promissory notes, and advances; and the doing of all such things as the directors shall consider incidental or conducive to the attainment of the above objects."

The bill alleged that the directors of the Joint Stock Discount Company, without power or authority, invested funds of said company in a new joint stock company called "Barned's Banking Company, Limited"; that shares in the latter company were applied for and allotted to certain directors of the Discount Company, who had received from the directors of the Discount Company a letter purporting to contain the promise of the Discount Company to indemnify them; that said shares were paid for by funds of the Discount Company and the allottees agreed to hold them in trust for the Discount Company; that it was understood that the shares thus held on behalf of the Discount Company were to be dealt with in such a way as would not militate against the interests of the Banking Company; and that the directors of the Discount Company passed a resolution agreeing not to sell any of the shares in the Banking Company under £2 per share premium before July 1, 1866.

The resolution under which the investment was made was set out in the bill as follows:—

"Resolved—that as the board consider that the formation of a limited joint stock bank on the basis of the absorption of the old firm of Messrs. *J. Barned & Co.*, of *Liverpool*, will be most conducive to the interests of the company by increasing its connections, the company, or its nominees, assist the same by applying for 10,000 shares in the proposed bank on the terms above stated."

The bill further alleged that the directors concealed from the Discount Company the aforesaid transactions, and caused entries to be made in the books falsely representing the payments actually made for shares as being "loans."

By an order dated March 17, 1866, the Plaintiff company was ordered to be wound up; and on May 8 an order was made for winding up *Barned's Bank*.

This bill was filed in July, praying for declarations that the directors of the Plaintiff company had no power or authority to take or accept the shares on behalf of the company, or to give the letter of indemnity, and for an order that such letter should be delivered up to be cancelled; also for a declaration that the appropriation of funds of the Plaintiff company for the purchase of the shares was a breach of trust; and for an account and payment.

To this bill the defendant *Brown* demurred.

G. M. Giffard, Q.C., and *Hemming*, in support of the demurrer.

Daniel, Q.C., and *Locock Webb*, for plaintiff.

SIR W. PAGE WOOD, V.C. I think it is quite clear that this bill must be answered, because, although a very ingenious argument has

been urged, and probably more may be said when the answer comes in, as to the force of the term "investing in securities," even assuming (which is as high as it can be put) that that would justify buying shares which were current in the market, and selling them again, the argument would not apply to the state of circumstances described in this bill.

The business is defined to be the business of bill-brokers and scriveners. That is enlarged to "the drawing, accepting, endorsing, discounting, and re-discounting bills of exchange and promissory notes, the making advances, and procuring loans on, and the investing in securities." That is the point most strongly relied on as regards the general power, independently of the sweeping clause at the end. Mr. *Hemming* relied very much on these words: "the making advances on securities, the procuring loans on securities, and the investing in securities." He says, investing *in* securities being made a thing distinct from advances *on* securities, would shew that there was something of a larger meaning than merely the taking of a mortgage, or the taking of a security. The "investing in" seems to be the actual purchase, as distinct from "advancing on." But, conceding that these words are large enough to include the power of going into the market, and buying railway shares, for a temporary investment, to be sold again afterwards; is the transaction stated and complained of in this bill a transaction of that nature? It was, in truth, a totally different transaction. The directors of the company come to a resolution "that as the board consider that the formation of a limited joint stock bank, on the basis of the absorption of the old firm of Messrs. *J. Burned & Co.*, of *Liverpool*, will be most conducive to the interests of the company, by increasing its connections, the company or its nominees assist the same by applying for 10,000 shares in the proposed bank on the terms above stated." Those are certain terms by which they were to "apply for 10,000 shares, in consideration of which Messrs. *Burned & Co.* are to undertake to pay to the company as bonus £10,000 in shares, and to give the company the option of taking 2000 of the 10,000 shares to be applied for." Therefore, what the resolution comes to is nothing in the shape of an investment in shares, as a means of investing money, but it is for the purpose of assisting, as they say, the discount business. They say, we intended to make a permanent investment in assisting this bank, and it is to be an investment distinctly not of that temporary character which consists of buying and selling shares in the market, because they reduce the 10,000 to 3000 ultimately, and in their letter they say — [His Honour read the letter of the 24th of July]. That statement is accepted. Supposing, therefore, the agreement to have been legitimate on the part of the company, that these shares were not to be dealt with in a way to "militate against the interests of the bank" (a phrase which must mean to provide against a hasty and rapid disposition of the shares, and to impose a fetter on their conversion), I apprehend a bill might have been filed

by Messrs. *Barned & Co.*, to enforce the agreement and restrain the sale of the shares.

But the matter does not rest there, with reference to this being a bill to be answered, because the subsequent statements of the bill aver that all this was done by these directors with a knowledge that it was not within their ordinary powers, and that they concealed from their shareholders the nature of the transaction.

So that the whole bill, as it seems to me, amounts to this:—
 “Assuming that you had power, if you would, to buy shares and sell them again, you had not power to enter into a transaction of this character, namely, that you would start a new concern by setting up a joint stock company with a view of increasing the discounts of the firm by so doing; and still less were you entitled to do that by keeping back from the shareholders the facts, and so preventing their having an option or a judgment in the matter. We say, therefore, that we have a right to have the act sifted to the utmost, and we will sift it to the utmost, first, upon the ground that you had no right to do it; and secondly, that you purposely effected it in this way, in order to keep back the nature of the transaction, and that we might not question it.”

Then as regards the second branch of the argument, which is this: that assuming this not to be within the clause for making advances and investing in securities, the directors are to do “all such things as they shall consider incidental or conducive to the attainment of the above objects” — it appears to me to be much too wide a construction of that clause to say, that if the transaction in question is not within the scope of the original terms there stated, it can be brought within the scope of doing that which is considered to be incidental to the attainment of the objects, the objects being to use money, by making it available in the shape of a return of interest, or of discount. How do they justify it in this resolution? They say, if we take all these shares in the bank, it will increase our connections. What a prodigious extension I must give to those words in order to bring it within the power of the directors to do anything which they may consider conducive to the interests of the company by increasing its connections, however unconnected with the objects stated! I apprehend those powers must be exercised only for the purpose of doing something *bonâ fide* connected with the objects to be attained, and in the ordinary course of business adapted to their attainment. This was the only ground on which I proceeded in the case of *Taunton v. Royal Insurance Company*.¹ There I found that the transaction impeached was in the ordinary course of business, and in the way in which other people conducted their business. In that case, if a large amount of advertisement, or of expenditure of money, had been found necessary, it would have been laid out properly; but to carry the principle on to

¹ 2 H. & M. 135.

any remote extension of the objects, on the ground that if shares were bought in this bank there would be some control over the business of the discounting, would be, I apprehend, wholly unwarranted by the plainest rules of construction, which must limit the company's powers to those transactions which are naturally conducive to the objects specified. If the principle were thus extended, it would apply to the buying shares in every sort of undertaking — a brewery, for instance, or any other business where discounts might be of use. The company might become ship-builders, or might be engaged in any other business; they might buy a share in any general merchant's business, because there would be bills in that business which would want discounting, and so they might get more business.

Perhaps the case of *Simpson v. Westminster Hotel Company*,¹ which was taken to the House of Lords, may be considered a strong application of the principle as to the extension of a company's powers. But that case proceeded on this ground, that the company did *bonâ fide* intend to use the building as an hotel, but they said: "One of the greatest expenses of our hotel is the furnishing of it. With our capital we have not the means of furnishing the whole building, but we have the means of furnishing it in part, and of thus starting it directly. Our only alternative, consequently, is either to leave the building which we have erected wholly unproductive, or to let it until we have got such a fund as will enable us to complete the furnishing." Therefore it was let, and that the letting was not so very far from the objects of the company was shewn by this, that they inserted a stipulation for furnishing luncheons to the different clerks in the office. Everything tended to shew extreme *bona fides* in making use of that as a clear and definite means of getting at their object, and as the only means they had of making the hotel available, because it came to the alternative of leaving the property wholly unproductive, or of getting £5000 a-year for it, with the additional chance of supplying a certain amount of eating and drinking on the premises.

In this case the proceeding is simply an embarking in a totally different business; it is not the buying shares for the purpose of selling them again, or for investment, or anything of that kind, but it is buying shares for the purpose of enlarging the particular business which the company have to conduct. I think that it is clear that the bill must be answered, and the demurrer must be overruled, with costs.

¹ 8 H. L. C. 712.

MILBANK v. NEW YORK, LAKE ERIE, AND WESTERN
R. R. CO. ET ALS.

1882. 64 *Howard's Practice Reports (New York)*, 20.¹

In the Supreme Court. Erie Special Term, October, 1882.

C. H. Daniels, *Edward Robinson*, and *John Clinton Gray*, for plaintiff and Buffalo, New York, & Erie R. R. Co.

J. C. Kilburn, and *E. C. Sprague*, for New York, Lake Erie, & Western R. R. Co., and Hugh J. Jewett, Receiver, &c.

HAIGHT, J. This action was brought by the plaintiffs, who are the owners of forty-nine shares of the capital stock of the Buffalo, New York, and Erie Railroad Company, on behalf of themselves and the other stockholders, to restrain and enjoin the New York, Lake Erie, and Western Railroad Company, its agents, officers, and directors, from voting at any meeting of the stockholders of the Buffalo, New York, and Erie Railroad Company for the election of directors or otherwise. The Buffalo, New York, and Erie Railroad Company is a corporation organized in the year 1857, and now existing under the laws of the State, for the purpose of constructing and operating a railroad from the city of Buffalo to the village of Corning. On or about the 27th of February, 1863, the Erie Railway Company entered into an agreement in writing with the Buffalo, New York, and Erie Railroad Company, by which the latter leased and rented to the Erie Railway Company its real estate, road-bed, rolling-stock, branch tracks, property, etc., for the period of 490 years, at an annual rental of \$233.100. At various times during the years 1873 and 1874 the Erie Railway Company purchased 5,759 shares of the capital stock of the Buffalo, New York, and Erie Railroad Company, being more than one half of all of the capital stock of such company, and paid for the same out of its corporate funds. Subsequently, and in the year 1878, all the property and franchises of the Erie Railway Company were sold under a decree of this court, on foreclosure of a mortgage on such property, to the defendant the New York, Lake Erie, and Western Railroad Company. By such sale the New York, Lake Erie, and Western Railroad Company claims to have become the owner of the 5,759 shares of the stock of the Buffalo, New York, and Erie Railroad Company, and threatened to vote thereon at the next meeting of such corporation for the election of directors.

There is no conflict as to the facts. In the first place, it becomes important to determine whether or not the purchase of the stock of the Buffalo, New York, and Erie Railroad Company by the Erie Company was *ultra vires* and against public policy,

¹ Portions of opinion omitted. — Ed.

[The learned Judge held, that, at the date of the purchase in 1863, there was no statute expressly prohibiting the Erie Railway Company from purchasing stock in other corporations. The opinion then proceeds:]

It consequently becomes necessary to consider the question at common law and under the general statute. In England there appears to be some conflict in the authorities; but in the United States, Green, in his American notes of Brice's *Ultra Vires*, page 95, says: "Corporations cannot purchase or hold or deal in stock of other corporations, unless expressly authorized to do so by law."

It has been held that a railroad corporation cannot lease its road-bed, rolling-stock, and franchises unless authority is expressly given, and such leases, if made, would be *ultra vires* and void. See *Thomas v. Railroad Company* (101 U. S. R. 71); *Troy and Boston Railroad Co. v. Boston, &c., Railroad Co.* (86 N. Y. 107); see also 80 N. Y. 27; 77 N. Y. 232. In the case of *Talmage v. Pell* (7 N. Y. 328) it was held that a bank corporation has no power to purchase the stocks of other corporations for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith as security for a loan made or a debt due such corporation, or when taken in payment of such loan or debt. In the case of *The Mechanics' Mutual Savings Bank v. The Meriden Agency Company* (24 Conn. 159) it was held that a company organized to do a general insurance agency, commission and brokerage business, has no power to subscribe to the stock of a savings bank and building association. In the case of *The Central Railroad Company v. The Pennsylvania Railroad Company* (21 N. J. Eq. 475) it was held that a corporation cannot, in its own name, nor in the name of individuals, subscribe for stock or be a corporator under the general railroad law. In the case of *Berry v. Yates* (34 Barb. 200), it was held that an insurance company has no power to subscribe to the capital stock of another insurance company. In the case of *Hazelhurst v. Savannah Railroad Company* (43 Georgia, 57), it was held that if one railroad buy the stock of another, it practically undertakes a new enterprise not contemplated by its charter. This cannot be done by any implication; the power to do so must be clearly expressed. In the case of *The Central Railroad Company v. Collins* (40 Georgia, 583) it was held that the power to buy and hold real and personal property and make contracts is confined to such property and such contracts as are incident to building, managing, and maintaining the railroad; that the purchase of stock in another railroad is outside of the objects of the charter.

In this State there is a statute which appears to me to control the question. Section 1, title 3, chapter 18, part 1, of the Revised Statutes in substance provides: "Every corporation, as such, has power, — first, to have succession by its corporate name for the period limited in its charter, and, when no period is limited, perpetually; second, to sue

and be sued; third, to make and use a common seal; fourth, to hold, purchase, and convey real estate; fifth, to appoint subordinate officers and agents; sixth, to make by-laws." Section 2 provides: "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated." Section 3 provides: "In addition to the powers enumerated in the first section of this title, and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given." See also *Colby's N. Y. Railroad Laws*, sec. 115, and authorities therein cited. In the case under consideration the right to purchase stock is not expressly given, and it is not claimed that the purchase of the stock in question "was necessary to the exercise of the powers enumerated and given."

The conclusion that I have reached is, that such purchase was not necessary in the exercise of any of its corporate powers; that it was unauthorized and in violation of the statute, and was consequently *ultra vires*. I do not understand this conclusion to be in conflict with the authorities which hold that a corporation may take title to all kinds of personal property to secure debts due it, created in lawful and legitimate business. The collection of such debts is among the powers given by the statute, and is necessary in the exercise of its corporate franchises. But collecting debts and investing its corporate funds are quite different acts.

In the second place, it becomes necessary to determine what, if any, title the New York, Lake Erie and Western Railroad Company have acquired to the stock, and what power it possesses over the same. In February, 1874, and subsequent to the purchase of the stock in question, the Erie Railway Company executed to the Farmers' Loan and Trust Company, as trustees, a mortgage to secure debts then owing, such mortgage covering all its property and franchises, including these shares of stock. The New York, Lake Erie and Western Railroad Company was organized under the general railroad law of 1850, and chapter 430 of the Laws of 1874, as amended by chapter 446 of the Laws of 1876. As such corporation it purchased all of the property, rights, and franchises of the Erie Railway Company under a decree made upon the foreclosure of the mortgage. Section 1, of chapter 446, among other things, provides that "the purchasers of such railroad property and franchises, and such persons as they may associate with themselves, their grantees or assignees, or a majority of them, may become a body politic and corporate, and as such may take, hold, and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges, and immunities which were possessed before said sale by the corporation whose property shall have been sold as aforesaid."

It is contended that under this statute the New York, Lake Erie and Western Railroad Company's title to such stock becomes absolute and perfect, notwithstanding the fact that the purchase by the railway company was unauthorized and against public policy. It is true that this statute authorizes the new corporation to take, hold, and possess the property included in the sale; but do these words of the statute change the character of the ownership from what it was under the old corporation? It held and possessed the title to the stock; it collected semi-annually the dividends accruing thereon. If a stockholder of that corporation had applied seasonably to the court it would have been restrained from paying out the corporate funds in the purchase of such stock. No action, however, was taken on the part of the stockholders; the corporation was permitted to purchase the stock and pay for it with its corporate funds. The money cannot be recalled. The stockholders, having rested upon their rights until the purchase was consummated, cannot be heard to complain, notwithstanding the fact that such purchase was unauthorized and in violation of its charter.

By this statute the Legislature intended to transfer this stock into the hands of the new corporation, and it does not appear to me that it was the legislative intent to invest the new corporation with any greater, different, or other title than that possessed by the old corporation. This, it appears to me, must have been the intention of the Legislature from the clause of the statute which follows: "And shall have all the franchises, rights, powers, privileges, and immunities which were possessed before such sale, by the corporation whose property has been sold as aforesaid." That is, the new corporation has the rights and power over this stock which were possessed by the old corporation before the sale. Again, it appears to me that it could not have been the intent of the Legislature to deprive other persons not interested in the old or new corporation so formed, of any rights or remedies which they may have had in reference to such stock; as, for instance, if the Buffalo, New York and Erie Railroad Corporation or its stockholders were injured or prejudiced by the voting upon such stock by the Erie Railroad Company, and were entitled to commence an action to protect themselves from injury, which might result from such voting, it does not appear to me that it was the intention of the Legislature to deprive them of such remedy by authorizing a transfer of this property to the new corporation.

This brings us to consider, in the third place, whether or not the Buffalo, New York and Erie corporation or its stockholders, the plaintiffs in this action, have such a standing in court that they can demand the relief prayed for. As I have before stated, the time has passed in which the stockholders of the Erie Railway Company could be heard to complain. The Buffalo, New York and Erie or its stockholders were not interested in the corporate funds of the Erie Railway Company, and the paying out of such funds in the purchasing of stock, although illegal and unauthorized, did not prejudice or injure such corporation or stockholders. The mere taking title to, the holding of the stock and the

collection of the dividends thereon, as they may accrue from time to time, work no injury to the Buffalo, New York and Erie Railway Company or its stockholders, and consequently they have no cause for complaint. It is only when the New York, Lake Erie and Western Railroad Company seeks to vote upon the stock, and thereby obtain control of the corporation, that such corporation or its stockholders can be prejudiced. No offer was made to vote on this stock while it was held by the Erie Railway corporation; it was not until after it had been purchased by the new corporation that the attempt to vote on it was made. The question thus presented is somewhat serious and important. I have been unable to find any reported case in which this question appears to have been squarely decided. The new corporation, the New York, Lake Erie and Western Railroad Company, has been organized under the general railroad law, and is now bound by section 8 of that statute.

It appears to me that the reason for the prohibiting of the purchasing of stocks in other corporations both under section 8 of the general railroad act and section 3 of the Revised Statutes, referred to, are twofold. First. It is against public policy to permit the officers of a corporation to take the corporate funds belonging to the stockholders and expend it in purchasing or speculating in the stocks of other companies. In the second place, it is against public policy to have or permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs, as may be done if it is permitted to purchase and vote upon the stock. Green in Brice's *Ultra Vires*, at page 604, under the head of "Proceedings by Third Parties," says: "The whole of the law, in so far as the present subject is concerned, may be summed up in the two statements: First, that as no person can institute legal proceedings on account of illegal acts, however great their detriment to the public or to others than himself, whether to obtain damages for them or to restrain their repetition, unless he has been personally damnified, so neither can he do so if the acts are *ultra vires* of a corporation instead of a private individual. Secondly, if on the other hand a private person be wronged by such acts, he may in every case sue for damages or to restrain them, and that, although the matter complained of would not have been a tort if done by an ordinary citizen. In a word, torts committed by a corporation stand, as regards legal proceedings by aggrieved parties in respect thereof, in exactly the same position as torts by private persons, with the single qualification, arising from the doctrine of *ultra vires*, that every act directed or concurred in by a corporation in excess of its powers will, if it causes harm to any third party, be a tort, and give to such party a right of action."

In the case of *The State, ex rel. The Attorney General v. McDaniel et al.* (32 Ohio, 354-368), a question was raised as to the right of the Cincinnati, Hamilton and Dayton Railroad Company to vote upon the bonds which it held of the Dayton and Union Railroad. It was alleged that it held the bonds illegally; that it got the control of the same, and

placed them in the hands of its directors to enable them to vote at the election for the purpose of getting control of the Dayton and Union Railroad, and of running the same in the interest of the Cincinnati, Hamilton and Dayton Railroad Company. It was held that it was not necessary to decide the question so raised, although the question was elaborately discussed upon the argument; but the learned justice who wrote the opinion in the case says, in reference thereto, that "we are all inclined to the opinion that it, the Cincinnati, Hamilton and Dayton Railroad Company, had no such power." This case seems to be the nearest in point of any that I have been able to find, and, while it was not necessary to decide the question in disposing of the case, yet all of the judges of the highest court of the State of Ohio were of the opinion that the railroad company who had acquired the bonds of another railroad company had no power to vote thereon, and thus acquire control of such corporation.

In the case under consideration, the New York, Lake Erie and Western Company have acquired by purchase the majority of all the stock issued by the Buffalo, New York and Erie Railroad. If its officers are permitted to vote thereon, they can elect a board of directors of their own choosing. It would then be for the interests of the New York, Lake Erie and Western Railroad Company to have the Buffalo, New York and Erie Company managed and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs and their fellow stockholders, and if so they have a right to complain.

My conclusions, therefore, are that while the New York, Lake Erie and Western Railroad Company is the owner of the stock in question, and has the right, while it remains the owner, to collect and receive the dividends thereon, and has the right to sell and dispose of the same, it has not the right to vote thereon, and that the stockholders of the Buffalo, New York and Erie Railroad Company have the right to have it enjoined from so voting in case it threatened to do so. Judgment should be ordered for the plaintiffs, in accordance with the views herein expressed, with costs.

KENNEDY v. CALIFORNIA SAVINGS BANK ET ALS.

1894. 101 *California*, 495.¹

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. The facts are stated in the opinion of the Court.

James E. Wadham, for appellant.

William H. Fuller, and *Works & Works*, for respondent.

¹ Arguments omitted. — Ed.

HARRISON, J. During the year 1891 the plaintiff deposited with the California Savings Bank, one of the defendants herein, different sums of money, for which the said defendant issued to him its several certificates of deposit, amounting, in the aggregate, to \$45,000. On the 12th of November, 1891, the plaintiff demanded of the savings bank payment of the amount of said certificates, and, upon its refusal, brought this action, making the other defendants parties to the action, for the purpose of recovering from them their proportion of said indebtedness as stockholders in the California Savings Bank. Judgment was recovered against the savings bank for the full amount of the claim, and against the other defendants for their respective proportions thereof, as such stockholders. The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far ultra vires that it cannot be made liable for any portion of the indebtedness of the corporation. The California Savings Bank was organized January 13, 1890. September 10, 1890, 990 shares of its capital stock were issued to J. W. Collins, cashier of the California National Bank, and on January 2, 1891, the certificates representing these shares were cancelled, and one certificate therefor was issued to the California National Bank, and was thereafter held by it until after the commencement of this action. During this period, two dividends upon this stock were paid by the savings bank to the appellant.

The defence of ultra vires is looked upon by courts with disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed, merely in excess of the powers conferred upon it, and not in violation of some express prohibition of the statute. Courts are inclined to treat the corporation as estopped from setting up this defence in all cases where it has received and retains the benefit of the transaction, and seeks by this plea to avoid its correlative obligation.

In *Evans v. Bailey*, 66 Cal. 112, an action was brought against the stockholders of the California Fruit and Meat Shipping Company to recover from them their respective proportions of certain indebtedness to the plaintiff of that corporation. One of these defendants was the People's Ice Company, another corporation, which held a thousand shares of the capital stock of the corporation debtor; and, to its objection that it was ultra vires for it to hold stock in another corporation, it was held that, as it did not appear that it was not within the scope of its power to hold stock in the defendant corporation under any circumstances, or for any purpose, and as the circumstances under which it had acquired the stock were not shown, the defence could not be maintained.

There is no provision in the statute by which a national bank is expressly prohibited from becoming a stockholder in another corpo-

ration; and, while it may be conceded that its subscription to the shares of another corporation would be so far in excess of the powers conferred by the statute under which it is organized that its executory contract therefor would not be enforced, it by no means follows that, if such contract is executed, and it has been registered as such stockholder, it is not entitled to a voice in its corporate management, or to its share of the corporate earnings, while the corporation is in existence, or of its assets upon a dissolution thereof. It may take shares in another corporation as collateral security for a loan made by it, and, if the loan is not paid, it may become the owner of those shares, and have them registered in its name upon the books of that corporation; and in such a case it is subject to the same liabilities as any other stockholder. In *National Bank v. Case*, 99 U. S. 628, the bank had become a stockholder in another corporation under such circumstances, and it was held to be liable for its proportion of the debts of the corporation in which it had been a stockholder, although it had transferred the stock to one of its clerks for the purpose of avoiding such liability.

As the appellant herein could have taken the stock of the savings bank in satisfaction of a loan for which it had been pledged to it as security, it was within the scope of its power to become a stockholder therein, so that it cannot be said that it was prohibited by statute from becoming such stockholder. Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law. "Strangers are presumed to know the law of the land, and they are bound, when dealing with corporations, to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose; but they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purposes is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duty, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose, and such is the presumption of the law; and, upon this presumption, strangers, having no notice in fact of the unlawful purpose, are entitled to rely." *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 587; 99 Am. Dec. 30.

The appellant has not repudiated the agreement under which it received the stock, but still retains it, and, so far as is shown by the record, claims to be owner of it, and to share in all the earnings and

assets of the corporation. During the period that it has claimed to be such owner, it has received dividends out of the assets of the savings bank, and to that extent diminished the corporate property which otherwise might have been appropriated in satisfaction of the plaintiff's claim. (See *Mitchell v. Beckman*, 64 Cal. 117.) Having had the benefit of the transaction, and still enjoying its fruits, it is estopped from denying a liability which is correlative to such benefit and fruits, and dependent thereon. See *Morse on Banking*, sec. 735.

The judgment and order are affirmed.

GAROUTTE, J., and PATERSON, J., concurring.

Hearing in Bank denied.

KNOWLES v. SANDERCOCK ET ALS.

1895. 107 *California*, 629.¹

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial.

The facts are stated in the opinion of the court.

Edward P. Cole, *Ernest Graves*, and *Sawyer & Burnett*, for various appellants.

Carter P. Pomeroy, for respondent.

TEMPLE, J. This action was brought by the assignee of numerous creditors of the California Southern Hotel Company, a corporation, against certain stockholders, to enforce their liability as stockholders for the debts of the corporation.²

It is contended by the California Furniture Manufacturing Company that the subscription of that corporation for 20 shares of the stock of the hotel corporation was *ultra vires*, in the absolute sense, and is void. It was admitted that on the 26th day of October, 1888, the hotel corporation issued to the appellant corporation 20 shares of stock, and received \$2,000 therefor, and that the stock is still retained by appellant.

The articles of the hotel corporation declare "that the purposes for which it is formed are the building, owning, and operating an hotel in the city of San Luis Obispo."

¹ Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

² "Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. . . ." California Civil Code, Section 322. — ED.

The articles of the defendant corporation declare that the "objects for which this corporation is formed are to manufacture, import, buy and sell, furniture and upholstery, and to carry on said business in all its branches, including the dealing in all materials appertaining to said business.

It will be seen that the defendant corporation is not authorized to deal in stocks, or to become a stockholder in other corporations. The general rule is, undoubtedly, that a corporation cannot own corporate stock, unless expressly authorized. Indeed, it has been said that statutes in regard to the formation of corporations do not authorize any but natural persons to become corporators. *Mor. Priv. Corp.* § 433.

"A private corporation has no implied authority to invest in shares of another private corporation. If this were so, it might, by an easy process, transfer its resources to another." *Spelling on Corporations*, § 172. See, also, *Taylor on Corporations*, § 267; *Brice on Ultra Vires*, 133; *Pearson v. Railroad*, 62 N. H. 537; *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44; *Central R. Co. of New Jersey v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Hotel Co. v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130; *Hazlehurst v. Railroad Co.*, 43 Ga. 57; *People v. Chicago Gas Co.*, 130 Ill. 268, 17 Am. St. Rep. 319; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9.

In this state a corporation is forbidden to engage in any business other than is expressly authorized in its charter, or the law under which it is organized. *Const. art. 12, § 9.*

To own stock in another corporation is to become interested in the business of such corporation. A stockholder is engaged in the business of the corporation, within the meaning of this section of the constitution. He has a voice in the management; may, in fact, control such business; and is, of course, liable for the debts incurred while he is a stockholder.

The above provision makes all acts which are wholly without the business of the corporation unlawful.

The only reply made by respondent to this point is that the subscription is sustained by *Kennedy v. Bank*, 101 Cal. 495. In this, I think, counsel is mistaken. It was there held that the bank rightfully invested its funds in the shares of other corporations. It has been held that banks and other corporations whose business it is to loan money may take stock in other corporations, as collateral, and, in the process of realizing their securities, may become the owners of them. Also, in some cases, such institutions may invest temporarily surplus funds in such securities. It has, however, been held, as to such corporations, that they cannot permanently invest in the stock of other corporations, unless authorized by their articles.

The corporation defendant has no funds to invest. Its capital is for the purpose of carrying on its business, no part of which consists in

getting interest on money, or making a profit in outside investments. Its sole purpose is to earn a profit for its stockholders through the business to be conducted by itself as specified in its articles. Its subscription, therefore, was ultra vires, and void.

The judgment and order are affirmed, as to all the appellants except the California Furniture Manufacturing Company, and as to it the judgment and order are reversed.

McFARLAND, J., and HENSHAW, J., concurred.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order refusing a hearing in Bank.

CHAPTER XXII.

POWER OF CORPORATION TO PURCHASE ITS OWN SHARES.

DUPEE v. BOSTON WATER POWER CO.

1873. 114 *Mass.* 37.¹

BILL IN EQUITY by minority stockholders in defendant corporation, to restrain the corporation from selling land and receiving its own stock in part payment.

C. B. Goodrich, for plaintiffs. Selling land of the corporation, and receiving payment of the purchase money in whole or in part, at the election of the purchaser, in the shares of the capital stock of the corporation, is a breach of trust. This is especially true when it is proposed to receive the shares at a sum much above the market value. It operates to the prejudice and injury of such of the shareholders as are unable or unwilling to purchase the land owned by the corporation. It is in effect a dividend, or return of capital to a portion of the stockholders, to the exclusion of others. It effects a reduction of the capital stock of the corporation in a manner not authorized by law. The defendant corporation has no power under its original charter to reduce its capital stock; if it has such power, it is derived from Sts. 1870, c. 224, § 24, and 1871, c. 110. The Boston Water Power Company has no authority to reduce its capital stock by a purchase thereof for the purpose of cancellation, or for a resale thereof. A reduction of its capital stock, if allowable in any case, must be by a particular course of proceeding provided by statutes, cited above.

[Remainder of argument omitted.]

D. Foster & G. W. Baldwin, for defendants.

COLT, J. This case is heard upon bill and answers. No issue is joined upon the truth of the defendants' allegations, and the only questions of law are those which arise upon the facts thus presented.

At an annual meeting of the defendant corporation it was voted that the directors be authorized, "if in their judgment the interest of the company will be thereby promoted, to receive in part payment for

¹ Statement abridged. Only so much of the opinion is given as relates to a single point. — ED.

the land of the company hereafter to be sold, the stock of the company, at such price for the land and the stock as may be deemed for the interest of the stockholders." Under this authority the directors advertised a number of lots belonging to the corporation to be sold at public auction, and paid for, at the option of the purchaser, one half in cash, and one half in the stock of the corporation at a price named [viz., \$75 per share]. There is no other action of the corporation or its directors, past or contemplated, relied on to support the bill. The prayer is that the defendants be enjoined and restrained from selling the company's lands by auction, or otherwise, in the mode proposed.

There is nothing in this vote of the corporation, or in the action of the directors, which amounts to a reduction of capital, or will amount to it, if the proposed sales take place. That must depend on future corporate action.

The only questions left upon the pleadings are, whether sales may be lawfully made of the company lands under the vote of the stockholders, at the annual meeting, to be paid for in its own stock at a price agreed, which price does not exceed its intrinsic value as based upon a reasonable estimate of its corporate property; and whether the agreement to fill the lots sold to the usual grade can be lawfully entered into.

In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers. *Leland v. Hayden*, 102 Mass. 542. *American Railway-Frog Co. v. Haven*, 101 Mass. 398. *Nesmith v. Washington Bank*, 6 Pick. 324, 329. *Coleman v. Columbia Oil Co.* 51 Penn. State, 74. *City Bank of Columbus v. Bruce*, 17 N. Y. 507. *Ex parte Holmes*, 5 Cowen, 426.

We cannot see that the rights of any of the stockholders will be illegally prejudiced by the proposed receipt of the shares in payment for its land.

Bill dismissed with costs.

LOWE v. PIONEER THRESHING CO.

1895. 70 *Federal Reporter*, 646.

NELSON, J.

The records of the corporation show that on June 25, 1895, at a stockholders' meeting, the following resolution was proposed and adopted, three persons representing stock voting in the negative:

"Resolved, that we, the stockholders of the Pioneer Threshing Company, do hereby instruct the board of directors elect to take the following action, at any time after this meeting, during their term of office, if in their judgment they deem such action advisable: (1) To buy from the resident stockholders of Faribault, and those joining with them, the stock issued on account of removal of the business of the company from Minneapolis, and pay therefor in plant, machinery, etc., property or assets of the company."

It is a mooted question in this country as to whether a corporation may purchase shares of its own stock. Many states forbid it. In the absence of a charter prohibition or a statute forbidding it, there is no reason why the stock should not be purchased, at least with the profits derived from the business of the corporation, where all the stockholders assent thereto. The tendency of the decisions in the state of Minnesota is on this line. See *State v. Minnesota Thresher Manuf'g Co.*, 40 Minn. 227, 41 N. W. 1020. But in the case at bar the purchase of the stock was to be made by a transfer of nearly all the assets and property of the corporation to a few favored stockholders, and, evidently, there would be no equal exchange in value. This, it seems to me, would be in fraud of the rights of the minority stockholders, who protested against the resolution to make this purchase of stock. I shall therefore refuse the motion for the appointment of a receiver, but shall order an injunction, restraining the directors from carrying out the plan contemplated by the resolution of June 25, 1895.

A decree will be entered accordingly.

TREVOR v. WHITWORTH.

1887. *Law Reports, 12 Appeal Cases*, 409.¹

APPEAL from a decision of the Court of Appeal.

James Schofield & Sons Limited were incorporated in 1865 under the Companies Act 1862 with a capital of £150,000 in 15,000 shares of £10 each. The objects, as stated in the memorandum of association, were to acquire and carry on the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith.

The memorandum did not authorize the company to purchase its own shares; but the articles of association purported to authorize such purchases.

The company having, in 1884, gone into liquidation, a claim was made against the company by the respondents, as executors of Whitworth, a deceased shareholder, for the balance of the price of Whitworth's shares sold by the executors to the company in 1880, and not wholly paid for.

The Vice Chancellor of the County Palatine of Lancaster disallowed the claim.

The Court of Appeal (Cotton, Bowen and Fry L.JJ.) reversed this decision and allowed the claim. Against this last decision the official liquidators now appealed.

Rigby Q. C., and *O. Leigh Clare*, for appellants.

Romer Q. C., and *A. C. Maberley*, for respondents.

LORD HERSHELL.

I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares. The result of the judgment in the Court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be

¹ Statement abridged. Arguments and portions of opinions omitted. — ED.

in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of *Ashbury Railway Carriage and Iron Company, v. Riche*,¹ that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal, but it is said to be settled by authority, that although a company could not under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act 1862 requires (sect. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to shew how inconsistent with the

¹ Law Rep. 7 H. L. 653.

very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sects. 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the busi-

ness to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shewn themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield &c. Co.*:¹ "It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits."

I turn now to the authorities. In *Teasdale's Case*² Lord Justice James said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." But in the subsequent case of *Hope v. International Financial Society*³ that learned judge said: "I am reported to have said in *Teasdale's Case*² that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, viz. to accept the surrender from the shareholder who cannot pay, and to

¹ 17 Ch. D. 76.

² Law Rep. 9 Ch. 54.

³ 4 Ch. D. 327, 836.

release him from further liability, that might be good, although incidentally and to a small extent it may be said to diminish the capital." In the case which gave rise to these observations, a company having 150,000 shares issued, passed a special resolution that the directors should have power to apply the company's assets to purchase from shareholders willing to sell any number of shares not exceeding 100,000, and that such shares should not be re-issued by the directors without the authority of a general meeting. The Court of Appeal, affirming Vice-Chancellor Bacon, held that this scheme was invalid. Lord Justice James said: "Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." And the present Master of the Rolls made the following observations: "I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares, the shares are not cancelled, they are existing shares, and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that may not be a continuing business, but no more was that which was done in the case of the *Ashbury Railway Carriage and Iron Company v. Riche*.¹ That was only to be one transaction, but because the transaction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that therefore was the intention of this resolution, then it broke the rules, by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished."

It appears to me that every word which I have just quoted from the judgment of the Master of the Rolls is strictly applicable to the circumstances of the present case. Again, in the case of *Guinness v. Land Corporation of Ireland*,² Lord Justice Cotton, after referring to sect. 38 of the Companies Act, said: "From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion, it also follows that what is described in the memorandum

¹ Law Rep. 7 H. L. 653.

² 22 Ch. D. 349, 375.

as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned judges of the Court of Appeal in the present case did not purport to depart from the views thus expressed, but their judgments were based upon the decision of that Court in the case of *In re Dronfield Silkstone Coal Company*.¹ In that case disputes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound up, and the question then arose whether Ward was liable to be placed on the list of contributories. The late Master of the Rolls held that he was, on the ground that the company had no power to purchase the shares, but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than with that of the Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase, and prior to the winding-up. It is not necessary, however, to detain your Lordships by a consideration of this question, as it can have no application to the present case. The transaction here is *inchoate*, and the Court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to *Phosphate of Lime Company v. Green*.² In that case the learned judges appear to have considered that the transaction amounted to a purchase of shares in the company, which was prohibited by its articles of association, but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in *Ashbury Railway Carriage and Iron Company v. Riche*,³ that a transaction not within the scope of the memorandum is incapable of ratification.

I move your Lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and

¹ 17 Ch. D. 76.

² Law Rep. 7 C. P. 43.

³ Law Rep. 7 H. L. 653.

in this House, and do repay to the appellants any moneys and costs received from them.

LORD WATSON.

In the case of a company limited by shares, the Act of 1862 requires that the amount of its capital, and the shares into which it is divided, shall be set forth in the memorandum of association; and sect. 12. which prescribes the extent to which the conditions contained in the memorandum may be modified, empowers the company to increase but not to diminish its capital. That limitation has been so far relaxed by the Act of 1867 as to permit a company to reduce its capital, with the sanction of the Court, after due notice to creditors, upon such terms as the Court may think fit to impose. The Act of 1877, upon the preamble that doubts had been entertained whether the power of reduction given by the preceding Act extended to paid-up capital, enacts (sect. 3) that the word "capital," as used in that Act, shall include paid-up capital. That declaration clearly expresses the will of the legislature that neither the paid-up nor the nominal capital of the company shall be reduced otherwise than in the manner permitted by the statutes.

When a share is forfeited or surrendered, the amount which has been paid upon it remains with the company, the shareholder being relieved of liability for future calls, whilst the share itself reverts to the company, bears no dividend, and may be re-issued. When shares are purchased at par, and transferred to the company, the result is very different. The amount paid up on the shares is returned to the shareholder; and in the event of the company continuing to hold the shares (as in the present case) is permanently withdrawn from its trading capital. It appears to me that, as the late Master of the Rolls pointed out in *In re Dronfield Silkstone Coal Company*,¹ it is inconsistent with the essential nature of a company that it should become a member of itself. It cannot be registered as a shareholder to the effect of becoming debtor to itself for calls, or of being placed on the list of contributories in its own liquidation. Accordingly, when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in the register, and holds the shares as trustee for the company, which undertakes to indemnify him from future calls. In that case, if the company goes into liquidation before its capital is fully paid up, the trustee is liable personally as a contributory for the amount then unpaid; but the amount withdrawn is never restored, and calls made upon the shares whilst the company is a going concern bring no addition to its capital.

The respondents are not resisting an attempt by the liquidators to include them in the list of contributories; they are seeking to enforce

¹ 17 Ch. D. 76. 83.

in a question with creditors the contract under which their shares were transferred to the company, and their success must depend upon the validity of that contract.

[The concurring opinion of LORD FITZGERALD is omitted.]

LORD MACNAGHTEN.

There remains, however, a more serious objection still. It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void. There are two conditions of the memorandum — the condition defining the objects of the company, and the condition defining its capital, — one or both of which would be affected by such a power. It must, therefore, be considered in connection with each. Suppose the dealing in its own shares were stated as an object for which a company was proposed to be established, could it be said that the subscribers were associated for a “lawful purpose” within the meaning of sect. 6 of the Act of 1862? If it were the only object of the company, no one would say so. Does the purpose of the association become lawful if legitimate objects are combined with an object which is not legitimate? It is significant that the Stock Exchange will not grant a settling day, or allow a quotation to any company which purports to have the power of buying its own shares. But let me suppose a case where the purchase of its own shares is not one of the objects of the company, properly so-called, but a case where the subscribers to the memorandum think that the power of purchasing its own shares might be useful in the management of the company if it were permissible by law. Then it seems to me that one way of trying whether it is permissible or not would be to read it into the memorandum in connection with the condition which states what the capital is to be. Let me try it here in that way, using the very language of Cotton L.J., who thought the power in the present case valid, because it was only “a power to authorize the board, whenever they thought it desirable for the purposes of the company, to buy the shares.” The condition would then run thus: “The capital of the company is £150,000 in 15,000 shares of £10 each; but the board may buy back shares whenever they think it desirable for the purposes of the company to do so.” It seems to me that a condition so qualified would be repugnant and contradictory to itself. At any rate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form.

So far I have not relied upon the Acts of 1867 and 1877, which are to be construed as one with the Act of 1862, because I think the question is clear on the earlier Act; but I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain con-

ditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed. Now the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power "to pay of any capital which may be in excess of the wants of the company," and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or "the payment to any shareholder of any paid-up capital." It follows that if the operation be effected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company.

One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862; it is mentioned in sect. 26; every company is to return to the registrar of joint-stock companies once a year "the total amount of shares forfeited." There can be no question as to the power of a company in a proper case to forfeit shares. Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction.

The present case is wholly different from *In re Dronfield Silkstone Coal Company*.¹ There it was sought to undo a transaction which could not be undone altogether so as to restore the parties to their original position, and which could not be undone at all without committing injustice. Here the applicants are seeking to enforce against the company a contract which has not yet been fully performed and which was beyond the powers of the company.

Order appealed from reversed. Order of the Vice Chancellor restored.

CLAPP v. PETERSON.

1882. 104 *Illinois*, 26.¹

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook County; the Hon. William H. Barnum, Judge, presiding.

Isham, Lincoln, Burry & Ryerson, for appellants.

Page & Plum, for appellee.

SHELDON, J. By the will of her step-son, P. W. Bonner, who died in July, 1870, appellee, Georgie H. Peterson, a resident of the State of New York, became owner of all personal property left by said Bonner, and in September, 1870, on application made to her in New York, she sold all said property to the Illinois Land and Loan Company. On November 20, 1874, she filed her bill against said company to set aside such sale, and for other relief in respect thereto, on the ground that she had been induced to make the sale through the fraudulent misrepresentations of the company, for an inadequate consideration, and on May 1, 1877, she obtained in the suit a money decree against the company for \$5653.33. An execution issued upon the decree having been returned *nulla bona*, Mrs. Peterson, on September 18, 1879, filed her bill in chancery in the present case, to subject property in the hands of Caleb Clapp to the payment of this decree. A decree was entered in her favor granting the relief sought, which, on appeal to the Appellate Court for the First District, was affirmed, and the present appeal taken to this court.

It appears that the Illinois Land and Loan Company was chartered by an act of the legislature in 1867, with a capital stock of \$100,000, with 1000 shares, of \$100 each, all of which was paid in. Caleb Clapp, a non-resident of the State, was a stockholder in the company, and in January, 1874, he surrendered to the company 555 shares of stock, in consideration of which the company executed to him a deed of warranty of two lots in Chicago, one of the value of \$50,000, and the other of the value of \$5500, that amount being the consideration stated in the deed. The stock was canceled, and was considered, at the time, of par value. Mr. Clapp continued to be till his death, and his estate still is, the owner of the lots. It is these lots which are sought to be subjected to the payment of said money decree against the company.

The legal principle which appellants' counsel lays down and insists upon as applying to the case, is, that corporations may purchase their own stock in exchange for money or other property, and hold, re-issue or retire the same, provided such act is had in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive, this implying that the corporation is neither insolvent nor in process of dissolution. We think there must be added to the proposition the further condition that the rights of creditors are not affected.

¹ Arguments omitted. — Ed.

The doctrine so elaborately urged by appellants' counsel, that a corporation has the power to purchase its own stock, seems well enough settled, and was asserted by this court in *Chicago, Pekin and South-western R. R. Co. v. Marseilles*, 84 Ill. 643. Yet, in so holding there, the qualification was added, that, in equity, the transaction might be impeached if it operated to the injury of creditors. We see nothing to show that the transaction in the present case was not in good faith, that there was any element of fraud about it, or that there was anything in the apparent condition of the company to interfere with the making of the exchange that was had. It is only as injuriously affecting the interests of creditors, we think, that the transaction can be questioned, and it is in that view that it must be considered and passed upon.

In *Sanger v. Upton*, 91 U. S. 60, it is laid down: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security." This doctrine is abundantly established by the authorities. 2 Story's Equity Jur. sec. 1252; *Wood v. Dummer*, 3 Mason, 308; *Spear v. Grant*, 15 Mass. 505; *Curran v. Arkansas*, 15 How. 304; *Bartlett v. Drew*, 57 N. Y. 587.

The shareholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock. As to it they cannot occupy the *status* of innocent purchasers, but they are to all intents and purposes privies to the trust. When, therefore, they have in their hands any of this trust fund, they hold it *cum onere*, subject to all the equities which attach to it. Thompson's Liability of Stockholders, sec. 13; *Wood v. Dummer*, 3 Mason, 312.

It is objected, against the principles above stated, that the cases in which they were declared were where there was actual or constructive fraud or unfairness, where the corporations were insolvent, or in process of being wound up. The question naturally would arise mostly in such circumstances, but the principles enunciated are general in scope, following from the nature of the capital stock of corporations, and the relation of a stockholder to the corporation, and we know of no limitation of their application as above suggested, or reason for denial of their full applicability to the present case. Indeed, we do not understand appellants' counsel as asserting the validity of the purchase, or reduction by a corporation of its stock, where it should directly appear that it was an injury to its creditors. But it is denied that there was any such injury in this case. It is said, first, the company actually

owed no one at the time, and even if it did, as the bill admits that the shares at the time of the exchange were valued at par, and worth full purported value, it follows from the stock being worth its par value, as a matter of course, that the company was then entirely solvent, and had assets sufficient to discharge all its debts, if it had any debts, and also to pay the stock in full, — that under no other circumstances could the admission of the bill be true. There was no proof as to the condition of the company, or the value of the stock, save the testimony of the secretary of the company that at the time of the deed to Clapp the stock in the company was at par value technically, — that he did not know what the market value was, and did not know that it had any market value. The admission of the bill was the simple fact that the stock was at par. The complainant, of course, knew nothing as to what made the stock at par. But if the stock was at par, in so rating it this indebtedness to appellee could not have been taken into account. It was supposed, of course, the purchase of personal property, which had been made of appellee, would stand, and that there was no liability on account of it. If, then, the stock was just at par, not considering appellee's claim with that claim recognized, the assets would have failed to pay the indebtedness of the company by the amount of her claim, to wit, \$5653.33, and to that amount the company was insolvent.

It is insisted that this exchange of corporate property for stock was unassailable by any one, because it was an exchange of equal values — the lots being worth \$55,500, and the shares of stock being worth \$55,500, there was equal value received, and there could be harm to no one. This cannot be so, as respects creditors. Suppose all the remaining property of the company had been one other lot worth \$44,500, and the company had made a like exchange with another stockholder of that lot for the remaining 445 shares of stock, and canceled the stock, what would there have been left to pay creditors? The partial exchange which was made affected the rights of creditors in a like way, only to a less extent. It is not as if there had been an exchange made with Clapp of these lots for other real property of equal value, or as if there had been a sale to him for \$55,000 in money. In such case a substitute would have been furnished to the company to which creditors might have had recourse for payment of their debts. But the exchange of corporate property for shares of stock, and canceling the stock, furnishes no equivalent for creditors.

Although the money decree in favor of appellee was not obtained until in 1877, some time after Clapp's purchase, yet the cause of action of appellee against the company (the fraudulent purchase of the personal property from her) arose in September, 1870, which was before the purchase by Clapp, that being in January, 1874, so that at the time of Clapp's purchase appellee must be regarded as being a creditor of the company.

We can but regard the transaction in question, of the exchange of

stock for the lots and the cancellation of the stock, as a withdrawal by the stockholder of his share of the capital stock, leaving appellee's debt against the company unpaid; that the transaction was to the injury of appellee as a creditor; that the property taken by Clapp stood charged with a trust for the payment of appellee's claim; that Clapp cannot be held to be an innocent purchaser, and that the property in his hands is affected with the trust, and appellee may pursue the property and subject it to the satisfaction of her debt.

It is insisted there was such *laches* here on the part of appellee in lying by for so long a time before the purchase by Clapp, taking no steps to disaffirm the fraudulent purchase from her, as should estop her from resort to this property in the hands of Clapp. Had appellee known of the fraud upon her, or should have known of it in the exercise of reasonable diligence, there would have been force in this position; but the bill alleges that on the discovery of the fraud appellee filed her former bill to set aside the fraudulent sale, and if such was the fact no *laches* would be imputable to her. Appellee's residence in a distant State would be a circumstance which would go to account for not sooner discovering the alleged fraud. We are not prepared to say that there was such *laches* here as should disentitle to the relief sought.

It is said that appellee's decree against the company was rendered, as well as the suit commenced, after Clapp had ceased to be a member of the company, and not being a party to the suit he should not be bound by the decree against the company, and that as against him the decree should not be taken as evidence of the alleged fraudulent purchase by the company from appellee. We think Clapp took the property affected with all equities as against the company, and subject to the equity of being charged with whatever prior claim might be established as against the company, and the decree is the highest evidence of an indebtedness by the company.

It is finally urged that at least the decree is erroneous in holding the property received by Clapp to be chargeable with the whole debt, instead of a share of it, in the proportion his stock bore to the whole capital stock. As among the stockholders such a *pro rata* decree would have been equitable. But in such a case as this, of a judgment creditor, after return of an execution against the company unsatisfied, seeking in a court of equity to reach certain specific property once belonging to the company, as charged with a trust for the payment of his debt, he may pursue the property into whosoever hands he may find it, where it stands affected with the trust, and subject it to the satisfaction of his debt, and he is not obliged to attend to adjusting the equities between the stockholders. We regard the following authorities as fully warranting this, and the form of the decree in this respect: *Bartlett v. Drew*, 57 N. Y. 587; *Marsh v. Burroughs*, 1 Woods, 463; *Hatch v. Dana*, 101 U. S. 205.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHAPTER XXIII.

POWER OF AN INSOLVENT CORPORATION TO PREFER
PARTICULAR CREDITORS.

CATLIN v. EAGLE BANK.

1826. 6 Conn. 233.¹

THIS was a bill in chancery.

The *Eagle Bank* is a corporation, established, by an act of the legislature, in *October*, 1811, for banking purposes, with the usual powers of such an institution; the charter being, at all times, subject to alteration, amendment or revocation, by the General Assembly.² The plaintiff is a creditor of this corporation to the amount of between 90,000 and 100,000 dollars. The bank, on the 15th *September*, 1825, failed, and was in fact insolvent. Among its creditors was *The Savings Bank of New-Haven*, a corporation, empowered to receive deposits from individuals, for safe-keeping and management, and obliged to pay the depositors the interest or profits that should accrue. This institution had deposited with the *Eagle Bank*, at an interest of four *per cent.* and to be returned on demand, all the money, which it had received, in small sums, from a great multitude of depositors, amounting to between 80,000 and 90,000 dollars. In payment and security of this demand, the directors of the *Eagle Bank*, after its actual insolvency, mortgaged to the *Savings Bank* real estate worth about 20,000 dollars paid to *Samuel J. Hitchcock*, Esq. secretary of the *Savings Bank*, about 15,000 dollars in money, and assigned to him sundry negotiable promissory notes, to the amount of about 52,000 dollars. The bill prayed, that these conveyances might be set aside, and that all the funds of the *Eagle Bank*, at the time of its failure, might be equitably distributed among its creditors, in proportion to their respective claims.

The case was reserved for the advice of this Court.

Sherman and *R. S. Baldwin*, for plaintiff.

N. Smith and *Hitchcock*, for defendants.

¹ Arguments omitted. — Ed.

² See the charter in the printed *Statutes*, previous to the revision of 1821, book 2, page 65.

HOSMER, Ch. J. It is an undoubted principle, that the powers of a corporation are solely derived from its charter, which is the law of its nature; and that it is invested with such powers only, as are expressly delegated, or which are necessary, to carry the express delegations into effect. *The New-York Firemen Insurance Company v. Ely & al.*, 5 Conn. Rep. 560. By the act of incorporation, the *Eagle Bank* had authority to purchase, hold and convey property, with the usual banking powers superadded; and the directors of the bank were authorized to dispose of and manage its monies, credits and property, and to regulate its concerns, in all cases, not specially provided for. To this general grant, in relation to the rights, privileges and duration of the bank, there is neither exception nor limitation, save that the charter is alterable, amendable, and revocable, at the pleasure of the legislature. It results, undeniably, that the rights, powers and duties of the bank, so far as they depend on the act of incorporation, remain unchanged, until it is revoked, and independent of its actual solvency or insolvency. The general laws of the land, or the principles which guide this Court, as a court of chancery, may make a difference on this subject; but setting aside these considerations, and admitting the operation of the charter exclusively, the bank is authorized to exercise the same powers, at all times, without reference to its condition.

Whether the directors of the corporation, after it has become actually insolvent, can make payment or give security to one of its creditors, and leave another unpaid and without security, is the general question to be determined. It has been contended, in behalf of the plaintiff, with no inconsiderable ingenuity, that the legislature intended to render the corporation at all times a trustee for the creditors. This suggestion is too unfounded, and too destitute of practical importance, to be admitted or discussed. Such a principle, during the solvency of the bank, must be dormant and useless; and neither the charter, nor the nature of the case, furnishes any warrant for the supposition.

If the corporation, so far as regards its right to manage and dispose of its property, has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. An individual debtor, who is actually insolvent, may prefer one creditor to another, unless in certain cases under the bankrupt laws; and to do this, as was said by Lord *Kenuon*, is neither illegal nor immoral. We have no bankrupt system, to control the acts of the insolvent merchant; and in the absence of all legal liens, he may prefer a creditor, if the act is done in good faith. To discuss the reasons of the rule is unnecessary. It is sufficient to say to those, who are not disposed to unsettle foundations, that it is firmly and uniformly established, both at law and in chancery. *Estwick v. Caillaud*, 5 Term Rep. 420. *Nunn v. Wilsmore*, 8 Term Rep. 521. *Hopkins v. Gray*, 7 Mod. Rep. 139. *Meux & al. v. Howell & al.*, 4 East, 1. *McMenomy & al. v. Ferrers*, 3 Johns. Rep. 84. *Willes & al. v. Ferris*, 5 Johns. Rep. 344. *Small v. Oudley*, 2 P. Wms. 427. *Cock v. Goodfellow*, 10 Mod. Rep. 489. *Phoenix v.*

Assignees of *Ingraham*, 5 *Johns. Rep.* 412, 426, 427. *Hendrick v. Robinson*, 2 *Johns. Ch. Rep.* 283.¹ The same rule is equally applicable to partners; and what is a banking corporation, in the essence, but a partnership authorised by a special act of the legislature? *Gow on Part.* 234. It is *an artificial person*; and this denomination is given to it, by reason of its resemblance to a natural person, in respect of its powers, rights and legal duties. It is difficult for me to conceive, where no restraint is interposed, in a charter of incorporation, on what ground, the general authority delegated is subjected to exceptions, or fettered by restrictions, from which an individual and a mercantile company are free. And this difficulty is much increased, as no case intimating this diversity between corporations and individuals, has been cited, nor can be found, by my utmost researches. Where no legal lien has been obtained, it is a reasonable supposition, that the relation of creditor and debtor, must, in all cases, infer the same consequences; and that where the same mischief exists, there is the same law. The cases of an individual and of a corporation, in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason, for the slightest difference between them. There exists no doubt, that there have been many instances of actually insolvent corporations, where certain creditors have been preferred to others; and the perfect silence until now, on the subject of this fancied diversity, is powerful to show what has been the universal opinion.

It however has been insisted for the plaintiff, that on the actual insolvency of the bank, the corporation were the *trustees* of the creditors; and if this be true, the latter become the *cestui que trusts* of all the corporate estate. The consequence, on this supposition, would be, that all persons coming into possession of the bank property, with notice of the trust, must be considered as trustees. *Daniels v. Davison*, 16 *Ves. jun.* 249. *Moore v. Butler*, 1 *Scho. & Lef.* 262. No express trust was created, on the happening of the bank's insolvency; but the charter on every fair principle of construction, conferred on the corporation the entire control of its property, as well after as before this event.

It however has been imagined, that the trusts arose by operation of law. I enquire of what law? No principle, or case, or analogy has been referred to, that supports the proposition; nor am I capable of conceiving any. The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the

¹ See also *Ingraham v. Wheeler*, *post*, 277, 284. *Spring v. South Carolina Insur. Co.* 8 *Wheat.* 268. *Brooks v. Marbury*, 11 *Wheat.* 78. *Brashear v. West*, 7 *Pet.* 608. *United States v. King, Wallace*, 21. *Richards v. Hazzard*, 1 *Stew. & Port.* 139. *Harman v. Reese*, 1 *Browne*, 11. *Linpincott v. Barker*, 2 *Binn.* 186. *Hickley v. Farmers &c. Bank*, 5 *Gill & Johns.* 377. *Cameron v. Montgomery*, 13 *Serg. & R.* 132. *Pierpoint v. Graham*, 4 *Wash. C. C.* 232. *Hatch v. Smith*, 5 *Mass.* 42, 49. *Widgery v. Haskell*, *Id.* 144, 153. *Stevens v. Bell*, 6 *Mass.* 339, 342. *Robinson v. Rapelje*, 2 *Stew.* 86. *Murray v. Riggs*, 15 *Johns. R.* 571, 583, 4, 5. *Grover v. Wokeman*, 11 *Wend.* 187. *Tillow v. Britton*, 4 *Halst.* 121. *Haven v. Richardson*, 5 *N. Hamp.* 113. *Howell v. Edgar*, 3 *Scam.* 417. *Williams v. Jones*, 2 *Ala.* 314.

trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trust arises. Undoubtedly, in all cases of actual insolvency, the creditor would derive security from this doctrine; and often great losses might be prevented. But the interest of the insolvent person is not to be entirely disregarded. His creditor has voluntarily become such, with full knowledge, that his security must very much depend on the integrity of his debtor. With open eyes he has given credit; and the public charter of the corporation has instructed him in all the powers and rights of the corporation. Now, it would be a very harsh and inequitable doctrine, but on the plaintiff's claim, it is inevitable, that the moment a banking institution is unable to pay all its debts, the directors of the bank may not issue a bank bill, dispose of bank property, make payment of a single debt, or perform one bank operation. May not an individual, or mercantile company, under the same circumstances, proceed in the usual train of business? This is not disputed. It is the law of chancery, that they may prefer one creditor to another; and this, on a principle of analogy, refutes, entirely, the supposition of a trust in this case. The novelty and unfoundness of the plaintiff's claim are such, that it is difficult to support, or even to oppose it, without taking leave of every established principle, and beating the air. That the directors of the *Eagle Bank* are trustees, I admit; but they are the trustees of the stockholders. The stockholders are the *cestuy que trusts*, and the charge of breach of trust must come from them. *The Attorney General v. The Utica Insurance Company*, 2 Johns. Ch. Rep. 371, 385.

The funds of the corporation, after its insolvency, have been called *equitable assets*; but the name was wholly misapplied. Equitable assets, generally speaking, are such as the debtor has made subject to his debts generally, that would not thus be subjected without his act; (2 Fonb. Eq. 402, n. d.) and which can be reached only by the aid of a court of equity. They are divisible among the creditors, as all property is, when placed under the jurisdiction of a court of chancery, *pari passu*, in ratable proportions. *Riggs & al. v. Murray & al.*, 2 Johns. Ch. Rep. 565, 577. But they must be assets, or they cannot be equitable assets; and this term does not express the nature of property, in the hands of an individual, partnership or corporation actually insolvent. On the estate of such persons, there is no equitable lien to interrupt the free progress of their business, or prevent the fair disposition of their property. The case of *Benson v. LeRoy*, 4 Johns. Ch. Rep. 651, cited for the plaintiff, illustrates the principles advanced. It proves only, that a devise of an estate to trustees, in trust to pay debts, and distribute the residue, places the assets under the jurisdiction of the court. Undoubtedly, it does; for by the express appointment of the devisee, the estate was a trust estate.

There is a class of cases, in which chancery has exercised a control over corporations, in relation to breaches of trust; but in such cases, the jurisdiction has alone been extended to *charitable* institutions.

Shaw v. Cunliffe, 4 Bro. Ch. Rep. 145. *Ball v. Montgomery*, 2 Ves. jun. 199. In *The King v. Watson & al.*, 2 Term Rep. 199, the court, however, intimated, without discussion, if any corporation misapplied monies, that it was an abuse of trust, which might be the subject of application to the court of chancery. This case has been doubted, by Lord Eldon, in *Attorney General v. Carmarthen, Coop. Eq. Rep.* 30, and in commenting upon it, it was observed, by the late Chancellor Kent, that the chancery cases do not recognize any such general jurisdiction. *Attorney General v. Utica Insurance Co.* 2 Johns. Ch. Rep. 384. In the case of *Adley v. The Whitstable Company*, 7 Ves. jun. 315, Lord Eldon, with hesitancy, admitted a jurisdiction in equity against a corporation, by ordering an account of profits, when, by an illegal by-law, the plaintiff was excluded from a share of them. This, it will be observed, was merely an equitable interposition, between the persons interested in certain profits, and does not at all support the principle, that chancery, in behalf of a creditor, will take cognizance of corporate funds misapplied. In *Vose v. Grant*, 15 Mass. Rep. 505, an action on the case was brought by a bill-holder, to recover a sum of money of the defendant, as a stockholder and director of a bank; the stockholders of the bank having divided their capital stock among themselves, so that the corporate funds were insufficient to redeem the outstanding notes and bills. The action was not sustained, by the court; and in giving his opinion, it was said by Jackson, J., that a court of chancery would probably give relief against the stockholders. This *obiter dictum* of a learned judge, on a point not made or discussed, and without the citation of principle or case, was not intended to express any thing more, than the first impression of his mind; and this is clearly manifested by the word "probably," with which the intimation was accompanied. On the other hand, in the *Attorney-General v. The Corporation of Carmarthen, Coop. Eq. Rep.* 30, the jurisdiction was denied, by the chancellor, in the very case of a misapplication of funds. And in the *Mayor and Commonalty of Colchester v. Lowton*, 1 Ves. & Bea. 226, Lord Eldon held, that there was no instance of a trust attaching, upon the ground of a misapplication of funds by corporations, except in the case of corporations holding to charitable uses.

From this discussion it is unquestionable, that the jurisdiction of chancery does not extend to the disposal of the corporation estate or funds of the *Eagle Bank*. More time has been occupied in the examination of the principle, than perhaps can be justified, as it has no application to the case before us. The bank has, in no proper sense, misapplied its funds. It has done what it had a right to do, and what is uncontrollable by this Court; that is, it has preferred to pay and secure the claim of what was considered a meritorious creditor. Of its creditors, the corporation was not a trustee; they had no lien upon its funds; and no case is made out, entitling the plaintiff to relief, or showing any jurisdiction exercisable by this Court.

The plaintiff's bill must be dismissed.

BRAINARD and LANMAN, Js. were of the same opinion.

PETERS, J. being interested in the question, and DAGGETT, J. having been of counsel in the cause, gave no opinion.

Bill to be dismissed.

KELLAM, J., IN ADAMS AND WESTLAKE CO. v. DEYETTE.

1895. *Supreme Court of South Dakota*, 65 *Northwestern Reporter*, 471, p. 477-480.

KELLAM, J. (dissenting). In our former opinion, now adhered to by a majority of the court, we went further, and said that the judgment ought not to be enforced, because it was an effort on the part of an insolvent corporation to prefer Deyette as a creditor, and that an insolvent corporation could not do this. The same cause and the same reason would condemn the entire judgment, as well for services as for money loaned; but upon further reflection and a more thorough examination of the question I am unable to concur in the opinion that a corporation, by becoming insolvent merely, ipso facto loses its right to pay or secure one creditor in preference to another. We have declared the right of an individual debtor to make such preferences. *Manufacturing Co. v. Max* (S.D.) 58 N.W. 14. We said the right of a debtor to prefer one creditor over another was guarantied to him by the express words of the statute. Section 4654. A corporation or a partnership becomes a debtor under the same circumstances as an individual. If the so-called "trust-fund doctrine" will prevent a corporation debtor from so preferring one creditor to another, I am unable to see why it should not have the same effect, and for the same reason, in case of a partnership. A corporation becomes insolvent just when the partnership or the individual becomes so, — when it is unable to pay its debts from its own means as they become due. Comp. Laws, § 4661. Is it well, then, unless required by prevailing authority, to adopt the rule that a private corporation, unable to meet its debts as they mature, has no right to pay one creditor until or more than it pays all others? It is often said in the books that the assets of an insolvent corporation are a trust fund for the payment of its debts, but this is also true of a partnership, and really of an individual; and for the same reason. Pomeroy says this doctrine of trust is just as applicable to a partnership and its assets as to a corporation and its assets, and that in either case the relation can only be so named by way of "analogy or metaphor." It further says: "It is plain that no constructive trust can arise in favor of the creditors unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordi-

nary legal means." 2 Pom. Eq. Jur. § 1046. If the rule of disability applies to an insolvent corporation on the ground of its trust relations to its assets, it would seem that it should also apply to an insolvent partnership; but in *Manufacturing Co. v. Max*, *supra*, we sustained the right of Max & Baisch, an insolvent partnership, to make such preferences. I cannot see why, in the case either of a corporation or a partnership, the mere fact of insolvency, without more, should of itself change the character of what was the absolute property of the corporation or partnership into trust funds. Insolvency creates a condition which justifies a court with equity powers in laying hold of assets, and then so treating and disposing of them. While the assets remain undisturbed in the hands of the corporation or partnership, solvent or insolvent, it owns and may dispose of them as an individual owner may, in any manner not fraudulent as to its creditors, including stockholders in case of a corporation.) Nearly all commercial credit is given to the individual, the partnership, or the corporation on the strength of its known assets, and in reliance upon a prudent management and an honest appropriation of them to the payment of his debts. In this sense the property of every debtor is a trust fund, with himself as trustee, for the payment of his debts. It is no more so simply because the debtor is a corporation, so long as it continues its active functions as such, and retains absolute control of its property. At no time does the trust attach to the property because it belongs to a corporation; but when the corporation becomes insolvent and unable to continue its active life it is so far civilly dead that its assets become subject to the administration of the courts. From that time on the assets coming into the hands of the court are treated as a trust fund for the benefit of creditors and stockholders, for they then constitute an estate to be administered. In *Graham v. Railroad Co.*, 102 U. S. 148, the learned Judge Bradley said: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust for the benefit of its creditors and stockholders. A court of equity, at the instance of proper parties, will then make these funds trust funds, which are, in other circumstances, as much the absolute property of the corporation as any man's property is his."

This trust doctrine, as applied to the assets of corporations, solvent and insolvent, was fully discussed by Judge Brewer in *Hollins v. Iron Co.*, 154 U. S. 371, 14 Sup. Ct. 127, and the construction of the court is thus stated in the headnote: "The expression often used, that the property of a corporation constitutes a 'trust fund' for its creditors, only means that when a corporation is insolvent, and a court of equity has possession of its assets for administration, such assets must be appropriated to the payment of its debts before any distribution to the stockholders, but, as between a corporation itself and its creditors, the former does not hold its property in trust, or subject to lien in favor of the creditors, in any other sense than does an individual debtor." In *Van Alstyne v. Cook*, 25 N. Y. 489, the court, in speaking of the

assets of an insolvent, limited partnership, said: "They are trust funds when the courts of equity are properly appealed to in behalf of the partners, or any partner or creditor, to protect and distribute the same upon equitable principles, and on such application assert the control over them. They are not trust funds in the hands of the partners any more than ordinary partnership property." The supreme court of Illinois declares the same doctrine in *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339: "The mere insolvency of a corporation cannot have the effect of depriving creditors of their legal remedies, but they are at liberty, notwithstanding the insolvency, to sue the corporation in an action at law, and by means of such proceeding establish a specific lien upon the property seized by attachment or execution. Such lien, when perfected, will doubtless entitle the creditor acquiring it to a preference over other unsecured creditors. After the aid of a court of equity has been invoked, and that court has taken the assets of the insolvent into its hands, its jurisdiction becomes necessarily exclusive; and it will proceed, in administering the insolvent estate, upon the maxim that equality is equity." See, also, the later case of *Peterson v. Tailoring Co.*, 150 Ill. 290, 37 N. E. 242. In *Town v. Bank*, 2 Doug. (Mich.) 530, it was held that a corporation has the same right to prefer one creditor over another than an individual has. This was followed in *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645, and again in the recent case of *Bank of Montreal v. E. J. Potts S. & L. Co.*, 90 Mich. 345, 51 N. W. 512, where it was held that "a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence its assets do not become a trust fund for pro rata distribution among all of its creditors, until steps are taken under the 'winding-up act.'" This "trust-fund" doctrine is luminously discussed by Judge Mitchell in *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117, who demonstrates that, unless prohibited by statute, an insolvent corporation has the same right as an individual to prefer creditors, and that there is no solid foundation for the doctrine that the insolvency of a corporation has the effect of converting its assets into a "trust fund," in any proper sense of that term. In *Ang. & A. Corp.* 802, it is laid down as an unqualified proposition of law that "the mere insolvency of a corporation neither impairs its powers to manage its affairs nor converts its property into a trust fund for the benefit of its creditors." Almost precisely the same thing was said in *Catlin v. Bank*, 6 Conn. 233, and reiterated by the same court in *Pondville Co. v. Clark*, 25 Conn. 97. In the former case the court discussed the question at great length. In the course of its opinion, it says: "The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analogous, but identical, and I discover no reason for the slightest difference between them. . . . The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors.

The same doctrine as to when the assets of an insolvent corporation

become trust funds was declared by the supreme court of Missouri in *La Grange Butter Tub Co. v. National Bank of Commerce*, 26 S. W. 710. The court said: "In case of an insolvent corporation, a court of equity will make distribution of the corporation assets pro rata among the corporation creditors, and to that end will regard the corporation property as a trust fund. It is in this sense, and upon this principle, that the assets are trust funds. They are trust funds when a court of equity is appealed to in behalf of any member of the corporation or creditor to protect and distribute the assets upon equitable principles." And again, in *Alberger v. Bank*, 123 Mo. 313, 27 S. W. 657, Judge Barclay, in speaking of the notion that insolvency transforms the assets of a corporation into a trust fund, said: "This theory seems to have a singular fascination to some learned jurists, but, in our opinion, it is wholly untenable as applied to the facts of such a case as that before us, under the law of Missouri;" and, after a very thorough and instructive discussion of the question, he concludes that "the creditor of a corporation has the same right to secure, by superior diligence or persistency, and to retain, a preference for his claim against a private corporation, that he would have were his debtor an individual engaged in the same line of business, provided, always, that the transaction is honest, — that is to say, not a mere cover to a purpose to hinder, delay, or defraud other creditors of the failing debtor." Such is also the declared law in New Jersey. In *Wilkinson v. Bauerle*, 41 N. J. Eq. 640, 7 Atl. 514, the court said: "If there be no legislative prohibition against the transfer of corporate property or its use in preferring creditors after insolvency, no reasons can be given why such transaction should be invalidated, which would not also invalidate the like transactions of individuals. Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors, although it is insolvent, unless such conduct is prohibited by law." The supreme court of Arkansas, in the recent case of *Worthen v. Griffith*, 59 Ark. 562, 28 S. W. 286, holds the same way, and that "it is only when a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of an insolvent corporation, that its assets may, in this state, be properly said to be a trust fund for its creditors." The same question as to the right of an insolvent corporation to make preferences was before the court in *Gould v. Railway Co.*, 52 Fed. 680. Judge Caldwell said that it was the settled law in Arkansas — from which state the case came — that it might lawfully do so, and added this significant statement: "The established rule in that state is in harmony with the general, though not quite uniform, current of authorities in this country on the question." After referring to a large number of supporting authorities, he adds: "The cases which hold the contrary doctrine are bottomed on the erroneous theory that the insolvency of a corporation in effect dissolves it, and makes the directors mere trustees to distribute its assets ratably among its creditors. It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment

of its debts; but this rule means no more than that the property of a corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of a corporation is applied to the payment of its bona fide debts. The rule, as has been often pointed out, does not prevent a corporation, whether solvent or insolvent, from making preferences among its creditors, and exercising in good faith absolute dominion over its property in the conduct of its legitimate corporate business, so long as its right to do so is not restrained by statute or by judicial proceedings." In his opinion Judge Caldwell refers to the following authorities, none of which I have cited, as sustaining his conclusion: 2 Mor. Priv. Corp. 802; *Allis v. Jones*, 45 Fed. 148; *Covert v. Rogers*, 38 Mich. 363; *Coats v. Donnell*, 94 N. Y. 168; *Dana v. Bank*, 5 Watts & S. 223; *Warner v. Mower*, 11 Vt. 390; *Whitwell v. Warner*, 20 Vt. 426; *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Duncomb v. Railroad Co.*, 84 N. Y. 190, 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Buell v. Buckingham*, 16 Iowa, 284 (opinion by Judge Dillon); *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. 395; *Smith v. Skeary*, 47 Conn. 47; *Bank v. Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Pa. St. 314; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Hallam v. Hotel Co.*, 56 Iowa, 178, 9 N. W. 111.

The supreme court of Alabama is equally pronounced against this "trust-fund" doctrine, and in a very able and elaborate opinion, filed as recently as April of the present year, it expressly repudiates such doctrine, and overrules a number of cases in which its existence had been recognized by that court. The learned judge who writes the opinion says: "There is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relations to the creditors of such corporation as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual or partnership, and is or is not to be impressed with a trust character upon the circumstances and under the same conditions in the first case as in the latter two." *Jewelry Co. v. Volfer* (Ala.), 17 South. 525. In the still more recent case of *Thomson-Houston Electric Light Co. v. Henderson Electric & Gaslight Co.*, 21 S. E. 951, the North Carolina supreme court deliberately rejected the "trust-fund" theory, and declared generally that the relation between a corporation creditor and the corporation, whether solvent or insolvent, is simply that of creditor and debtor, and that the creditor had no equitable claim upon the corporation assets, either because it was a corporation or because it was insolvent. The supreme court of Indiana has lately made the same expression in emphatic terms in *First Nat. Bank of Crawfordsville v. Dovetail B. & G. Co.*, 40 N. E. 810, and in the same further held (bearing upon the first question discussed in this opinion) that "the

fact that one lending money to a corporation knew that it was to be used by the directors for a purpose involving a breach of trust does not impair the validity of the judgment against the corporation in his favor for the amount loaned, entered by the corporation's consent, with the purpose of creating a preference." In Burrill, Assignm. (5th Ed.) § 64, it is said: "It has been objected . . . that on the happening of its insolvency the corporation and its agents became trustees for the creditors, who were entitled to a ratable payment out of the trust fund in proportion to the amount of their debts. This position, however, has not been sustained, and, apart from statutory provisions, no distinction exists between an individual and a corporation in regard to the exercise of the power of conferring preferences."

Without quoting from other cases, in which very wise and thoughtful judges have announced similar views, I am satisfied to say that to me they seem right in principle. If, for any reason, there should be a discrimination between different classes of debtors in respect to the right to make preferences among their creditors, as said by Judge Dillon in *Buell v. Buckingham*, *supra*, the rule should be declared by the legislature, which has the constitutional power to make and change the law, and not by the courts, which have no such power. It may be remarked, however, that as to some of the cases cited generally in support of the contrary doctrine they were controlled by local statutes which unfortunately are not mentioned, or at least not made prominent, in the opinion. For instance, both Ohio and Texas cases are cited as opposed, and *Rouse v. Bunk*, 46 Ohio St. 493, 22 N. E. 293, and *Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co.*, 86 Tex. 143, 24 S. W. 16, do so read, but in each state there was a statute declaring that any transfer of property as a preference by a debtor who is insolvent or "in contemplation of insolvency" shall not be valid as against an assignment then in contemplation for the benefit of creditors. What influence, if any, this declared policy of the state law had upon the treatment of the general question by the courts we do not know. I have read with interest what Mr. Thompson says upon this question in his recently published work on Corporations. He is an author of acknowledged learning and ability. Upon all matters he expresses his personal views positively and clearly, and usually courteously and dispassionately; but his treatment of this question, his characterization of the deliberately declared opinions of eminent courts and judges as "the mouthings of judges" with "low conceptions," "destitute of a sense of justice," and other similar flippancies, evince such a degree of morbidity upon this subject as greatly to compromise the value of his opinion. He says (section 6496) the "fallacy" of the conclusion to which these thoughtless judges have "jumped" is in overlooking "the fact that the analogy between an individual and an insolvent corporation wholly fails in this: that although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may, by so doing, hinder and delay the others, yet he

merely delays and hinders them; he does not, by that act, destroy himself; he still lives; and he may, and often does, get on his feet again, and acquire property, and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the object of its creation, and dispossesses itself of all its property, it destroys itself, and becomes ipso facto dissolved." In his zeal to demonstrate the "fallacy" has not the learned author allowed himself to start from unstable premises? Is it entirely safe to build upon the foundation that when a corporation becomes insolvent, "and dispossesses itself of all its property, it destroys itself, and becomes ipso facto dissolved?" In section 6483 of the same book he has told us that "the assignment by a corporation of all its property for the benefit of its creditors does not extinguish it as a corporation, or disable it from maintaining an action, unless the subject-matter of the action passed from it by the assignment." In this latter statement he seems well supported by authority, though Judge Story, in a dissenting opinion in *Beaston v. Bank*, 12 Pet. 138, intimated a contrary opinion. See Burrill, Assignm. (5th Ed.) § 64; Ang. & A. Corp. § 770; and cases cited by each of these authors. The law is generally recognized to be, as stated by Mr. Thompson, that neither the insolvency of nor a general assignment by a private corporation works its dissolution. An individual debtor, stripped of his means for satisfying his debts, "still lives"; but it is just as true of a corporation. Each is still a living debtor without present ability to pay his or its debts. It is probably true that an individual debtor is more likely to "get on his feet again," but that is incidental merely, and does not prove or tend to prove any difference in their legal status. The possession of property is no more essential to the existence of a corporation than it is to the existence of a man. If a corporation becomes insolvent, there is nothing to prevent its members, until its dissolution is legally declared, from furnishing more funds, and proceeding to use its corporate powers. Mor. Priv. Corp. § 1010, and citations. My conclusion is that the hardware company, although insolvent, might legally prefer Deyette as a creditor, and that his judgment, founded on a good consideration, was not invalid or unenforceable on account of such preference.

SCHUFELDT v. SMITH.

1895. 131 *Missouri*, 280.¹

IN DIVISION ONE.

APPEAL from Buchanan Circuit Court.

Suit to set aside a deed of trust executed by an insolvent corporation, in pursuance of a resolution of the directors. It was virtually

¹ Statement abridged. Arguments omitted. — ED.

admitted in argument that one of the claims preferred by this deed was guaranteed by the president of the corporation, and that another preferred claim was the property of an estate of which the president was administrator. The president was one of the three directors who passed the resolution.

In the Circuit Court a decree was entered setting aside the deed of trust.

Huston & Parrish, S. S. Brown, and H. K. White, for appellants.

Dowe, Johnson & Rusk, Stauber & Crandall, W. P. Hall, and Vinton Pike, for respondents.

MACFARLANE, J. [After stating the case:]

Most of the questions involved in this record have, in some recent cases in this court, been given careful and exhaustive consideration. The investigations given the subject have been more labored and thorough on account of apparent want of harmony in some of the previous decisions of this court, as well as on account of the diversity of opinion in other jurisdictions. The conclusion reached by each of the divisions, which received the concurrence of all the members, may be briefly given in the language of the syllabi prepared by the judge who wrote one of the opinions as follows:

“A corporation in failing circumstances may . . . prefer one creditor to another in discharging its obligations, if such preference is made in good faith while the property of the company remains in its possession, unaffected by liens or by process of law. . . . Mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all its creditors.” *Alberger v. Bank*, 123 Mo. 313; *Slavens v. Cook Drug Company*, 128 Mo. 341; *Waggoner-Gates Milling Co. v. Commission Company*, 128 Mo. 473.

In the case last cited, which was decided by division two of this court, it was also held that preference in the same circumstances may be given to a creditor of a corporation who is secured by the indorsement of some of its directors.

It would seem to follow logically from these decisions that a preference may be made to a director for a debt directly due him from the corporation, unless it would be defeated by his own act in voting himself the preference.

But it is insisted with much earnestness, and argued with great ability, that the directors had no power to bind the corporation to an agreement made with themselves, and in which they had a personal interest, and that, therefore, the resolution of the board of directors authorizing preferences to be given the members thereof over other creditors, and the deed of trust executed in pursuance thereof, were absolutely void.

This contention must rest upon one of two theories, either that the directors of a corporation are trustees for its creditors, and its assets constitute a trust fund which they must apply ratably toward the satisfaction of all the debts, or that such a transaction is, upon its face, constructively fraudulent.

As has been seen, the so-called trust fund theory as applied to a corporation while dominion over its property is retained is not recognized in this state as being sound. Nothing additional need be said on that subject.

The board of directors are undoubtedly trustees for the corporation and stockholders, and when acting for them are bound to exercise the utmost good faith. Any attempt in dealing with its property or affairs to secure themselves personal advantages over other stockholders should at least be subject to the most rigorous scrutiny. *Hill v. Rich Hill, etc., Co.*, 119 Mo. 9, and cases cited.

But it can not be said as a correct proposition of law that officers of a corporation cannot themselves, and in their own names, contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to indorse for them, without subjecting themselves to such disadvantages, they would be deprived of their most valuable source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money, or indorse for it, they should certainly have the same right to collect the debts or secure themselves, as is accorded to other creditors.

The cases cited abundantly show that a corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another. A mortgage, then, giving such preference is not constructively fraudulent. Neither the corporation nor the other stockholders are injured by the preference given. To defeat them actual fraud should be shown. The honest debts all stand and should stand on equal footing. All the creditors should have equal rights to enter in the race of diligence. The fact that the race may be unequal should not deprive the winner of his reward. An individual debtor can prefer his family, his neighbors, and his friends. If the preferred debt is honest, the preference can not be impeached, though the wife of the debtor secure the advantage. *Hart v. Leete*, 104 Mo. 338; *Riley v. Vaughan*, 116 Mo. 176. No reason can be seen why a corporation may not also prefer its friends. There is no more equity in allowing an individual debtor to prefer his creditor wife or children, than in allowing a corporation to prefer its stockholders and officers. To permit equities to control would defeat all preferences.

While the owner of property retains the power of its disposal, he may apply it to the payment of any honest debt, is the rule upon which the right to make preferences among creditors rests. The rule should apply as well to corporations as to individuals, and any change should be made by the legislature and not by the courts. If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another.

"It may be conceded," said Judge TAFT in a recent case, "that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing, beyond question, that he had a *bona fide* debt against the corporation: but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a *bona fide* creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends, and relatives, so a corporation may prefer its friends." *Brown v. Furniture Co.*, 58 Fed. Rep. *loc. cit.* 292. See, also, *Worthen v. Griffith*, 28 S. W. Rep. (Ark.) 286, and cases cited.

We do not think, therefore, that the deed of trust is constructively fraudulent for the reason that it gives preferences to a director of the corporation. When the right of the corporation to give preferences to any of its creditors is conceded, the logical conclusion follows that it can give them to any creditor who holds an honest debt against it, though he be an officer or stockholder.

This conclusion is in accord with the declaration of SHERWOOD, J., in a recent case. He says: "A corporation, within the scope of the purposes for which it was incorporated, may do any act in furtherance of those purposes which an individual in similar circumstances might do, and, though insolvent, may prefer some creditors to others, even though such creditors are among the directors of the corporation." *Foster v. Planing Mill Co.*, 92 Mo. 87.

While the directors of a corporation do not sustain the strict relation of trustees for its creditors, yet their duties to them and their relation to the corporation itself are such as impose upon them some of the obligations of trustees. In dealing with the corporation they deal with themselves. They determine the liability of the corporation to themselves. They should, therefore, be required, in case they give themselves a preference over other creditors, to show that all their secured debts are fair, honest, and justly due them. This burden properly rests upon them.

From this record it appears that the invalidity of the deed of trust in question was declared to result from the mere insolvency of the corporation at the time it was executed. The question of the *bona fides* of the debts of directors, who were given preferences, was not gone into on the trial. The act of the directors in voting themselves preferences would make the deed of trust *prima facie* fraudulent in fact, but not conclusively so as a matter of law. The court evidently did not decide the case upon the presumption of fact that the deed was fraudulent, which it might have indulged. We, therefore, reverse the judgment and remand the cause for a new trial. BRACE, P. J., BARCLAY, and ROBINSON, JJ., concur.

ROUSE v. MERCHANTS' NATIONAL BANK.

1889. 46 *Ohio State*, 493.¹

WILLIAMS, J. The general question for decision in this case, is, whether a corporation for profit, organized under the laws of this state, can, in the disposition of the corporate property, after it has become insolvent, and ceased to further prosecute the objects for which it was created, prefer some of its creditors over others.

The claim of the plaintiff in error is, that when the corporation becomes insolvent and ceases to carry on business, its property and assets constitute a trust fund for the benefit of its creditors, and the directors in possession of the corporate property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all the corporate creditors. The defendant in error, on the other hand contends, that when not restricted by the law of their creation, or prevented by the operation of some bankrupt or insolvent law, insolvent corporations may, the same as natural persons, make preferences among their creditors.

Decisions of courts will be found, maintaining each of these diverse positions. The precise question has not been decided in this state, and in view of the conflict of authority elsewhere, we are at liberty to adopt that rule, which best harmonizes with the policy and legislation of the state, rests upon the sounder reason, as we conceive it to be, and coincides with our sense of justice and right.

The right of the individual debtor to prefer one creditor to another, though at the time insolvent, rests upon his complete dominion over, and consequent unrestricted power of disposition of his property. And the cases which hold that insolvent corporations are entitled to make preferences among their creditors, attribute to them the same unlimited control over their property that is possessed by individuals over theirs. In *Catlin v. Eagle Bank of New Haven*, 6 Conn. 233, which is the leading case in this country maintaining the right of an insolvent corporation to prefer one or more of its creditors over others, the decision is distinctly placed upon the ground that the particular corporation was invested with the control, and power to dispose of the corporate property, as fully and to the same extent that natural persons have with respect to their property. Hosmer, C. J., in the opinion in that case, says: "If the corporation, so far as regards its right to manage and dispose of its property, has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. . . . The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason for the slightest difference

¹ Statement and arguments omitted. — ED.

between them." And again he says that "no express trust was created on the happening of the bank's insolvency; *but the charter*, on every fair principle of construction, conferred on the corporation the entire control of its property, as *well after, as before this event*. . . . The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trust arises."

We have not the charter of the corporation in question in that case before us, but we assume that the learned judge was correct in saying that by every fair construction, it conferred upon the corporation the entire control of its property after its insolvency; if so, no fault need be found with his conclusion, that it might, like any individual, prefer some of its creditors over others.

Corporations generally do not possess such amplified powers, and especially those created under the laws of this state. In this state, corporations have not the same powers and capacities as natural persons, but are authorized for specified and defined purposes. They are clothed with those attributes only, with which the law, under which they are created, invests them, and can exercise no powers, not expressly conferred, or necessary to carry into effect those in terms granted.

Since the constitution of 1851, it has been the settled policy of this state, to afford adequate protection to the creditors of corporations. That constitution contains the provision that "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Legislation, under this constitution, has been shaped to fully effectuate the constitutional guarantee. All corporations organized for profit, are required to have a capital stock, fifty per cent. of which must be subscribed, and at least ten per cent. paid in, before the organization can be effected; and the stockholders are made liable, in addition to their stock, to an amount equal to the stock held by them, to secure the payment of the debts of the corporation. This liability, it has uniformly been held by this court, is a security exclusively for the benefit of the creditors of the corporation, over which the corporation has no control; and, moreover, the security is for the equal benefit of all the creditors. The suit to enforce it must be by all the creditors, and against all the stockholders; and no creditor can acquire priority over the others, with respect to it. And, while power is conferred on corporations to reduce their capital stock, it is expressly provided that the rights of creditors shall not be affected, nor in any way impaired. The corporate powers, business and property of the corporation, must be exercised, conducted and controlled by a board of directors, all of whom must be stockholders; and, as a

still further guarantee for creditors, the powers of corporations over their property, its use and disposition, are so circumscribed by positive statute that no corporation can employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation. The extent of the powers expressly conferred on them are, to sue and be sued, contract and be contracted with, and acquire and convey such real and personal estate as may be necessary or convenient to carry into effect the objects of the corporation, to make and use a common seal, and do all needful acts to carry into effect the objects for which they are created. It is obvious, that the corporate property, cannot with propriety be said to be owned by the corporation, in the sense of ownership as applied to property belonging to natural persons. The latter may without restriction, acquire and dispose of property for any lawful purpose, while both the power of acquisition and disposition of the former, are limited to the special objects already mentioned. The corporate property is in reality a fund set apart to be used only in the attainment of the objects for which the corporation was created, and it cannot lawfully be diverted to any other purpose. As soon as acquired, it becomes impressed with the character of a trust fund for that purpose, and the shareholder or creditor may interpose to prevent its diversion from the objects of the incorporation, injurious to him. Taylor on Private Corporations, sec. 34.

The custody and control of the property, and the management of the business of the corporation, are confided to a board of directors chosen by the shareholders. Into the hands of these officers, through whom alone corporations can act, the shareholders surrender their funds, and entrust the management of the affairs and property of the corporation to them. A relation of trust and confidence, therefore, arises between the stockholders and directors of a corporation, out of which grow the duties of the latter, to so administer the trust as will best promote the interests of the former, to pay them their appropriate dividends from time to time, and upon the termination of the corporation, to distribute to them their respective shares of the corporate property, after the payment of its debts and liabilities. These duties are eminently of a fiduciary nature. It is now so well established as to be no longer a subject of controversy, that the relation of trustee and *cestui que trust* subsists between the directors and shareholders. And, since the directors, as such trustees, represent and act for all the shareholders, they cannot lawfully favor any particular shareholder or class of shareholders; but every authority and power possessed by them, must be exercised for the benefit of all alike. Otherwise, no corporation could endure. If the directors and officers of a corporation were allowed, in the conduct of the business, and disposition of the property, to favor one or more shareholders to the detriment of the others, the minority would be the prey of the majority; for, it would then be within the power of the majority to combine and elect the

officers, who in turn should manage the whole business and apply the whole corporate property for the benefit of the majority, and thus practically confiscate the entire property interest of the minority. Corporations would thus become traps for the unwary, and legalized instruments of fraud. The doctrine that the directors are trustees for the shareholders, and for the equal benefit of all, it is obvious, is essential to the existence of corporations.

But, it is the right of the creditors, equally with the shareholders, to have the corporate property applied to the purposes for which the corporation was created, and this includes the payment of the corporate indebtedness contracted in the prosecution of its business. The rights of the creditors to the corporate property, so far as it is necessary to meet their demands, are superior to those of stockholders.

In Perry on Trusts, sec. 242, the relative rights of the creditors and shareholders are thus defined: "A corporation holds its property in trust, *first* to pay its creditors, and *second* to ~~distribute to its stockholders~~ *pro rata*. If therefore a corporation should dissolve, and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom the property had come, into trustees, and would compel them to account for the property and contribute to the payment of the debts of the corporation to the extent of its property in their hands."

It is now firmly established, that the property and assets of a corporation are a trust fund for the payment of its debts, especially in case of its insolvency. Since the case of *Wood v. Dummer*, 3 Mason, 311, where Mr. Justice Story is said to have first formulated the doctrine, it has been generally accepted, and is sustained by the highest authority. Mr. Justice Swayne announces it with great clearness, in *Sanger v. Upton*, 91 U. S. 56, 60, as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liabilities which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation, for their security." In *Curran v. State of Arkansas*, 15 How. 312, Mr. Justice Curtis said on this subject: "The capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of its creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied." And in *Upton, assignee v. Tribilcock*, 91 U. S. 45, 47, Mr. Justice Hunt thus lays down the doctrine: "The capital stock of a moneyed corporation is a fund for the payment of its

debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts." The doctrine is sustained by many authorities: 2 Story's Eq., sec. 1252; Pomeroy's Eq., sec. 1046; Taylor on Private Corp., sec. 654, 655; *Haywood v. The Lincoln Lumber Co.*, 64 Wis. 639. It was held by this court, as early as *Taylor v. Miami Exporting Co.*, 5 Ohio, 165, where the opinion of Mr. Justice Story in *Wood v. Dummer*, *supra*, is quoted with approbation, and it is more distinctly announced in the later case of *Gooden v. The Canal Co.*, 18 Ohio St. 182, where it is said to be "well settled that the property of a corporation is a trust fund in the hands of its directors, for the benefit of its creditors and stockholders."

It being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows, that after the insolvency of the corporation is ascertained, and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property, become trustees thereof for the creditors; and this relation necessarily forbids any discrimination between the beneficiaries, in the distribution or application of the fund. The due execution of the trust demands absolute impartiality toward the *cestuis que trustent*. They must be treated alike, and no preference can be made among them, without a direct violation of the duties arising from the relation. It would seem clear, that, if the corporate property constitutes a fund for the creditors, it is as much so for one creditor as for another, and that the directors in possession, are without authority to dispose of it in disregard of the rights of any creditor. They can no more discriminate between creditors in such case, than they could, before the insolvency of the corporation, between the shareholders. The objects for which the corporation was created being no longer prosecuted, and the occasion, for the exercise by the board of directors, of the power of control and disposition of the property for such purpose having ceased, there remains no purpose to which its assets can lawfully be devoted, except to the payment of the debts. In equity the corporate property becomes the property of the creditors, and their equities are equal. Every creditor, who became such by parting with his money, property or other thing of value to the corporation, contributed to the accomplishment of its purposes, and augmented its corporate fund; and when the fund is no longer demanded for the purposes of the corporation, the rights of the creditors become fixed instantly and equally; for each, having contributed to the common fund, has an interest in it, in proportion to his claim, equally with every other creditor. This interest is sometimes called the equitable lien of the creditor on the corporate property, which enables him to follow it, even after it has left the hands of the directors, wherever it

can be found, except in the possession of *bona fide* purchasers for value, and subject it to the payment of the corporate indebtedness. It would seem to result as a necessary consequence, that insolvent corporations which have ceased to carry on business, cannot, by pledge or mortgage of the corporate property to some of the creditors, in payment or security of antecedent debts, without other consideration, create valid preferences in their favor over others; and this is the view maintained by the more recent writers on the subject.

In the last edition of Taylor on Private Corporations, it is said: "When corporations become insolvent, the duty of the directors toward its creditors becomes even stricter and more imperative; for, under such circumstances, the rights of creditors are paramount, and it has become probable that they will be somewhat damaged; and the plain duty of directors who control the funds from which corporate debts are paid, is to see that the loss is as small as possible. Moreover, since, upon the insolvency of the corporation, the rights of unsecured creditors are equal, it would seem to be unlawful, even in the absence of a statute expressly forbidding it, for directors to make preferences among them." (Sec. 759.) And, in sec. 668, it is further said: "To allow an insolvent corporation to make an assignment of its property, giving preferences to a portion of its creditors over the others, is unjust, as well as utterly repugnant to the doctrine that corporate property is a trust fund, on the credit of which persons contract with the corporation. If such property constitutes such a fund, it is clearly held in trust for the benefit of one creditor just as much as another, and to prefer one creditor to another is evidently beyond the authority of the trustee. This view is far from being unsupported by direct authority."

Mr. Morawetz, in his excellent work on private corporations, referring to the cases which hold that corporate preferences are valid, says:

"This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security, has often been recognized by the courts of equity in adjusting the rights of creditors among themselves, and in relation to the company's shareholders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property, in order to carry on its business and further the purposes for which the company was formed. The purposes of corporation are not furthered in any

manner, by giving it or its agents the power, after the company has become insolvent and has ceased to carry on business, and after its shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress. The doctrine that an insolvent corporation may prefer certain creditors at the expense of others, seems to have been first started in *Catlin v. Eagle Bank* (6 Conn. 233), a case in which the fundamental rule that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and is contrary to the plainest principles of justice." (2 Morawetz, Corporations, sec. 803.)

And in a very recent work on insolvent corporations it is said: "The practical working of the rule sustaining corporate preferences is monstrous. The unpreferred creditors have only a myth or shadow left to which resort can be had for payment of their claims; a soulless, fictitious, unsubstantial entity that can be neither seen nor found. The capital and assets of the corporation, the creditors' trust fund, may, under this rule, be carved out and apportioned among a chosen few, usually the family connections or immediate friends of the officers making the preference. This rule of law is entitled to take precedence among the many reckless absurdities to be met with in cases affecting corporations, as being a manifest travesty upon natural justice." (Wait on Insolv. Corporations, § 162.) "Elsewhere we have deprecated the right which is recognized in a number of cases, of insolvent corporations to make preferential assignments. It would seem to be an idle waste of words to designate the capital and assets of a corporation as a trust fund for the benefit and security of creditors in the event of dissolution or insolvency, if one of the first principles of the law of trusts—equality of distribution—could be openly violated, and the effects of the bankrupt company apportioned among a favored few." (Ib., § 654.)

Without extending the discussion, we are of opinion that when a corporation for profit, organized under the laws of this state, becomes insolvent and ceases to carry on its business or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors, in proportion to the amounts of their respective claims; and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf, over the other creditors, or over an assignment thereafter made for the benefit of creditors.

Instead of the individual liability of the stockholders being a ground of objection to this conclusion, it furnishes an additional reason in its support. It is well settled that the corporate property is the primary fund for the payment of the debts of the corporation, and the statutory

liability of the stockholder is a security to be resorted to only when the payment of its debts cannot be enforced against its property; and it was held in *Harpold v. Stobart*, decided at this term, that stockholders who have assigned their stock to an insolvent assignee, are liable only for such portion of the debts existing while they were such stockholders, as is equal to the proportion which their stock bears to the stock held by all stockholders liable for the same debts. Admit the power of the board of directors of an insolvent corporation to make preferences among its creditors, and it must follow that they may prefer any they choose to select for that purpose. This would be wholly inconsistent with the trust relation subsisting between the directors and shareholders, for since different stockholders, or classes of stockholders may be liable for different debts, and not all for the same debts, if the directors could apply the corporate property to some of its debts, leaving others entirely unprovided for, they would be at liberty to select the debts for which particular stockholders alone were liable, and appropriate all of the property to their satisfaction, leaving the other stockholders to respond to the full extent of their statutory liability, for the remaining debts. The directors would in this way, be enabled to apply the whole corporate property to their own exoneration.

Whether an insolvent corporation, which is still a going concern, and in good faith engaged in the prosecution of its business, may borrow money, or contract, or procure an extension of other *bona fide* indebtedness, and convey or pledge the corporate property in security thereof, is a question not involved in this case, and upon which we here express no opinion.

It appears from the finding of facts in this case, that the directors of the corporation declared its insolvency, and directed by the same resolution, the execution of an assignment for the benefit of its creditors, and of the preferential mortgages to the bank, and other creditors. It does not appear, that there had been any agreement between the mortgagees and the corporation that such mortgages should be given, nor, that they were given for any other consideration than the antecedent indebtedness of the corporation to the creditors receiving them. Being merely voluntary mortgages to secure pre-existing debts, without other consideration, they cannot prevail against the equitable rights of the corporate creditors. *Lewis v. Anderson*, 20 Ohio St. 281.

No serious objection is made here to so much of the judgment of the court below as establishes the amount of the plaintiff's claim, and requires the assignee to allow the same in the administration of his trust, and to that extent the judgment is affirmed. But the judgment establishing the validity of the mortgage, and giving it priority over the assignment, is reversed, and judgment will be entered upon that branch of the case for the trustee.

Judgment accordingly.

OLNEY v. CONANICUT LAND CO.

1889. 16 *Rhode Island*, 597.

BILL IN EQUITY to annul a mortgage and for a receiver.

August 10, 1889. STINESS, J. The complainants, judgment creditors of the Conanicut Land Company, seek to set aside a mortgage given to the defendants Lippitt, Davis, and Bradford, to secure them for advances, and for their indorsements of the notes of the company. The mortgage was given immediately after the complainants had brought suits for damages against the company for negligence, and when the company was insolvent; the agreed statement of facts showing that it had not sufficient assets with which to discharge all its outstanding indebtedness, were payment of the same to be demanded when due. Since then the complainants have levied execution on the property of the company. The complainants claim that, as the mortgagees are three of the four directors who voted to give the mortgage, thereby securing themselves, their action is so inconsistent with their fiduciary relation that it should be set aside. No fraudulent act in regard to the giving of the mortgage is alleged, other than the fact itself; and the case being submitted on bill, answer, and agreed facts as to the validity of the mortgage, we have the simple question whether directors of an insolvent corporation are debarred in equity, by virtue of their positions, from preferring debts due to themselves. In so far as the mortgage is to be regarded as a mere preference, it is not contended that it is invalid. Except as limited by statute, the right of a debtor to prefer a part of his creditors has always been upheld in this State. *Dockray v. Dockray*, 2 R. I. 547; *Elliott v. Benedict*, 13 R. I. 463. The vital question is, whether a director of an insolvent corporation is to be regarded as a trustee for its creditor. If he is so, the duty of a trustee to a *cestui que trust* is plain. For a trustee to collect his own debt, to the detriment of that of his *cestui*, is a clear breach of fidelity. When one accepts the trust of caring for another's interest he accepts the attendant duty. It must be admitted that directors of a corporation are not technical trustees. They do not have in themselves the title to property which they hold for the benefit of others; and certainly, as to creditors, they are under no express trust. The corporation is a legal being, distinct from its stockholders and officers. It may deal with them as individuals and may owe them debts. It holds its own property, and has the capacity and responsibility of acting for itself. Nevertheless the conduct of its affairs must, of necessity, be intrusted to officers in whom confidence is reposed, to whom large powers are given, and by whom its property is managed for the common benefit. As corporations have multiplied and have become so greatly concerned in business affairs in recent years, the obligations arising from such a

relation have become correspondingly prominent. While the decisions in regard to this relation are not harmonious, it has been generally agreed that directors are trustees for stockholders. This being established, we think it follows naturally that, when the corporation becomes insolvent and the stockholders have no longer a substantial interest in the property of the corporation, directors should be regarded as trustees of the creditors to whom the property of the corporation must go. If directors, with their office, assume the duty of caring for the interests of the stockholders, why do they not also assume the duty incidentally of caring for the interests of those who, instead of the stockholders, may come to have claims upon the corporate property?

In speaking of directors as trustees for stockholders, Mr. Justice Miller, in *Sawyer v. Hoag*, 17 Wall. 610, calls this "a doctrine of modern date;" but as long ago as the time of Lord Hardwicke we find the duties and obligations of a director of a corporation thus clearly set forth: "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. But it cannot be said to be an employment affecting the public government. Therefore committee men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees." *Charitable Corporation v. Sutton*, 2 Atk. 400. To the effect that officers of a corporation are trustees for the stockholders, see *Hodges v. New England Screw Co.* 1 R. I. 312; *Hoyle v. Plattsburgh & Montreal R. R. Co.* 54 N. Y. 314; *Koehler v. Black River Co.* 2 Black, 715; *York & North Midland Railway Co. v. Hudson*, 16 Beav. 485; 19 Eng. Law & Eq. 361; *Great Luxembourg Railway v. Magnay*, 25 Beav. 586; *Hope et ux. v. Valley City Salt Co.* 25 W. Va. 789. Indeed, no cases, that we know of, deny a fiduciary relation of directors to stockholders, however they may differ in the use of terms to describe it. This relation has led logically to the conclusion that in case of insolvency, the assets of the corporation being no longer held for the benefit of stockholders, but for the benefit of creditors, the directors owe to the creditors the duty of a trustee. This duty is clearly stated by Clifford, J., in *Bradley v. Converse*, 4 Cliff. 375: "Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation, and courts of equity will enforce the execution of such trusts in favor of creditors, even when the matter in controversy may not be cognizable in a court of law. Such assets are usually controlled and managed by directors or trustees, but courts of equity will not permit such managers, in dealing with the trust estate, in the exercise of the powers of their trust, to obtain any undue advantage for themselves, to the injury or prejudice of those for whom they are acting in

a fiduciary relation. Exact equality of benefit may be enjoyed, but the trustees are forbidden to protect, indemnify, or pay themselves at the expense of those who are similarly in relation to the same fund."

To the same effect are *Bradley v. Farwell*, 1 Holmes, 433; *Jackson v. Ludeling*, 21 Wall. 616; *Corbett v. Woodward*, 5 Sawyer, 403; *Stout v. Yaegers Milling Co.* 3 Fed. Rep. 802; *Haywood v. Lincoln Lumber Co.* 64 Wisc. 639; *Richards v. New Hampshire Insur. Co.* 43 N. H. 263; *San Francisco & North Pacif. R. R. Co. v. Bee*, 48 Cal. 398; *Gaslight Improvement Co. v. Terrell*, L. R. 10 Eq. 168; *Hopkin's & Johnson's Appeal*, 90 Pa. St. 69. Of the cases cited by the defendants, only three fully sustain their claim that, as creditors of the company, directors may, in the absence of fraud, secure themselves for their own debt, viz.. *Burr's Executors v. McDonald*, 3 Gratt. 206; *Planters' Bank of Farmville v. Whittle*, 78 Va. 737; *Garrett v. The Burlington Plow Co.* 70 Iowa, 697.

In the case of *Railroad Co. v. Claghorn*, 1 Speer Eq. 545, 562, frequently cited upon this point, the mortgage in question was not given to, nor was the suit brought against, directors; neither did the court find that the company was insolvent when the mortgage was given. The case depended mainly on a statute. In *Stratton v. Allen*, 16 N. J. Eq. 229, 232, the court expressed no opinion upon the point taken that the defendant was a trustee by virtue of his office as director, but did hold that he was not entitled to priority, but must share proportionately with other creditors. This case also depended upon a statute.

In *Buell v. Buckingham*, 16 Iowa, 284, Judge Cole stated there was no evidence that the company was insolvent. Judge Dillon conceded that directors are trustees for stockholders, and treats the case as a sale voidable between trustee and *cestui que trust*, to which a subsequent attaching creditor, having no lien upon the property at the time, could not make objection.¹ *Garrett v. The Burlington Plow Co.* depended upon this and other cases in Iowa which had followed its apparent doctrine. In *Burr's Executors v. McDonald*, the question was not discussed upon principle or authority. In *Planters' Bank of Farmville v. Whittle*, the question was elaborately discussed. The cases upon which the court relied were *Railroad Co. v. Claghorn*; *Stratton v. Allen*; and *Buell v. Buckingham*, to which we have referred; also *Ashhurst's Appeal*, 60 Pa. St. 290, which was a suit by stockholders, denied on account of *laches* and absence of fraud, the court saying: "Creditors could have avoided what was done, but the complainants are not claiming as creditors or through creditors." *Smith v. Skeary*, 47 Conn. 47, in which the company was supposed to be solvent at the time of the transaction complained of; also *Gordon*

¹ NOTE BY THE REPORTER.—See, on this point, *In re Wincham Shipbuilding, &c.* Co. Jessel's Decisions, 240; L. R. 9 Ch. Div. 322, 328.

On the doctrine of the decision see *Curran v. Arkansas*, 15 How. U. S. 304, 311, and 1 Hare Amer. Constit. Law, 635-637, text and note.

v. *Preston*, 1 Watts, 385; *Whitwell v. Warren*, 20 Vt 425; and *Sargent v. Webster*, 13 Met. 497, in neither of which cases was this subject treated of at length, or as an important element of the case.

We think the weight of recent authority regards directors of an insolvent corporation as trustees for creditors, and that this authority stands upon the better reason. — If, as Judge Dillon said, the right to collect a debt is “a race of diligence,” open alike to both, it must be admitted that it is a race in which the outside creditor is unduly handicapped. The parties do not contend upon an equal footing; and although it is said that the director has only an advantage which results from his position, and which is known to all who deal with the corporation, yet no one would say that an ordinary trustee should be entitled to an unequal start with his *cestui*, by means of information received in the discharge of his trust. If, then, the director be a trustee, or one who holds a fiduciary relation to the creditors, in case of insolvency he cannot take advantage of his position for his own benefit to their loss. The right of the creditor does not depend upon fraud or no fraud, but upon the fiduciary relation.

It is claimed by the defendants that it was agreed they should have security before the company became insolvent, and that this mortgage was given pursuant to such agreement. We do not think this claim is supported. The answer sets out that in January, 1874, the stockholders authorized the treasurer to execute a mortgage to secure certain directors who indorsed the notes of the company; but nothing was done under this vote. November 22, 1877, the stockholders again voted a mortgage to secure the then directors and indorsers, in a sum not exceeding thirty thousand dollars, which mortgage was given, December 4, 1880, in order to raise from a stranger a new loan of \$15,000 upon mortgage, which was to be a first lien upon the property of the company. The directors, two of whom were persons not now directors nor parties to this suit, cancelled and discharged their mortgage upon the agreement for new security as aforesaid. This loan was increased, in January, 1884, to \$23,000, and a new mortgage given. It is not shown, however, that the company made such an agreement. No vote of the company is recited or put in evidence; the directors had no authority under the by-laws to make such an agreement, and it does not appear what would have been the total amount of indebtedness. If the proceeds of the new mortgages paid all the debts of the company, there was nothing due the directors and their mortgage was properly discharged, with no occasion for such an agreement. If they still held debts, such debts may have gone above the limit placed in the resolution. But however this may have been, no mortgage was given or demanded during a period of about eight years. In January, 1884, the company adopted by-laws which gave the directors full power to mortgage the corporate property; but for more than four years after this no demand for a mortgage was made, nor did the directors vote to give one. In the absence of an

express agreement, we think the directors had no right, after they became aware of the unprofitable and disastrous state of the affairs of the company, to appropriate its entire property to secure themselves. But they say the complainants were not creditors, whose rights they could consider, at the time of the mortgage. True, they had not reduced their claims to judgment; but the claims existed, and the defendants had notice of them by the commencement of suits. As trustees for creditors, we think the directors were as much bound to care for those who had given them notice of their claims by suits, in case they should succeed in obtaining judgments, as for those whose claims had been already ascertained. Their action was taken with full knowledge that these claims might ripen into judgments, entitled to payment from the property of the company. We fail to see that it was any less the duty of the directors to protect these liabilities of the company than those arising upon contracts which the holders were not prosecuting to judgment. If it be said there is a difference, because of a presumption that contracts are made upon the trust and confidence reposed in the directors, it may also be presumed that, with equal trust and confidence in them, the complainants became guests of the hotel, assuming that they would not, through negligence, allow it to become dangerous to life and health.

Our conclusion is that, in view of the fiduciary relation of the directors to the creditors of the company, they are not entitled to priority over the complainants by virtue of their mortgage.

Daniel R. Ballou & Frank H. Jackson, for complainants.

Darius Baker & Rathbone Gardner, for respondents.

WOODS, J., IN HOWE, BROWN, & CO. v. SANFORD FORK AND TOOL CO.

1890. 44 *Federal Reporter*, 231, p. 233-234.

WOODS, J. It is not to be overlooked that some of the later decisions which deny the validity of preferences in favor of directors proceed upon the theory that the directors of an insolvent corporation, even before a suspension of business, are trustees for the creditors, and, if that theory is essential to the conclusion, the question is perhaps already foreclosed in the federal courts; because, in *Purifier Co. v. McGroarty*, 136 U. S. 241, 10 Sup. Ct. Rep. 1017, the supreme court has said that the decision in *Rouse v. Bank*, *supra*, "proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence."

But I do not think that theory indispensable. It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be, exclusive, knowledge of the corporate affairs into means of self-protection to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests I think will compel its recognition and adoption. The fact in this case that the stockholders authorized the making of the mortgage seems to be immaterial. That action was, it is averred, procured by the directors proposed to be benefited, they, themselves, being stockholders; and, even if this were not averred, the case would not, I think, be essentially different. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth; and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization, for the purpose, not only of escaping the ordinary risks of business done in the owner's name, which may be legitimate enough, but of enabling the promoters and managers, when failure comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which Equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence.

CHAPTER XXIV.

VOTING RIGHTS OF STOCKHOLDERS.

TAYLOR v. GRISWOLD.

1834. 14 *New Jersey Law* (2 J. S. Green), 222.¹

THIS was an application to set aside an election held for directors of the Passaic and Hackensack Bridge Company. Depositions taken by both parties were read on the argument.

At the election, the inspectors rejected every vote that was given by proxy; and allowed to each proprietor only a single vote, instead of as many votes as he had shares of stock. If the votes so rejected had been counted, the plaintiffs would have had a majority.

The charter enacts "that the said corporation, or a majority thereof, shall, from time to time, &c. have full power to make such by-laws, resolves and regulations for their government, as they shall deem proper, which shall be binding on the said corporation in all respects: *Provided* they be not repugnant to any part of this act, nor to the constitution and laws of this state." The proprietors, prior to their incorporation, while they existed only as associates, enacted a by-law declaring "that each stockholder shall have as many votes as he has shares, by himself, or by proxy." This by-law had always and uniformly been acted on from that time until the election now in question.

W. Pennington and *Vanarsdale*, for applicants.

Dodd and *Wall*, *contra*.

HORNBLOWER, C. J. This is a proceeding under the fourth section of the act to prevent fraudulent elections by incorporated companies, &c. passed the 8th of December, 1825. On the 3d day of August last, an election was held for directors, &c. of the Passaic and Hackensack Bridge Company, which resulted in the choice of George Griswold and others. An application is now made by John Taylor and others, to set aside that election on three distinct grounds, viz.:

1. That notice of the time and place of election was not given according to law.

¹ Statement compiled from statement by reporter and from opinions of HORNBLOWER, C. J. and FORD, J. The opinion of HORNBLOWER, C. J. is given only on a single point; and the concurring opinion of FORD, J. is omitted. — Ed.

2. That the inspectors acted contrary to law, in rejecting the votes that were offered by proxies; and

3. That the inspectors also erred, in allowing to each stockholder but one vote, instead of a vote for each share owned by him.

Each of these objections will be considered in the order above stated.

First. Was due and legal notice given of the time and place of holding the election?

[HORNBLOWER, C. J. and FORD, J. both *held*, that the notice was sufficient.]

Second. Did the inspectors of the election act contrary to law in rejecting the proxies?

[HORNBLOWER, C. J. and FORD, J. both held that the proxies were properly rejected. They *held*, that the members of a corporation have not, upon common law principles, a right to vote by proxy; and that a corporation cannot, either in virtue of its incidental powers, or in virtue of a general authority to make by-laws like that given in this charter, delegate to its members the right of voting by proxy. They criticised at length the case of *State v. Tudor*, 5 Day (Conn.), 329, which decides that the right of proxy voting can be conferred by a by-law.]

The last, and certainly the most important, though by no means, the most difficult question, remains to be answered, viz.:

Third. Are the stockholders entitled to only one vote each, or to a vote for every share of stock they respectively own? This question is not put in reference to the mere matter of election. The right to a plurality of votes, if it exists at all, extends to every subject that may be discussed, and every resolution that may be submitted at any meeting of the stockholders. The by-law does not restrict the right of voting upon shares, to the election of officers; nor did I understand the counsel as confining the rule to that subject. Indeed it is not easy to perceive how it can be, or why it should be so limited. If the right exists under this charter, it is a general right, and may be exercised upon every subject.

To my mind, the answer to this question is perfectly plain, whether it is considered upon general and common law principles; or upon the terms of the charter itself.

1st. Upon general principles. Every corporator, every individual member of a body politic, whether public or private, is, *prima facie*, entitled to equal rights. If, for political purposes, every person residing within the chartered limits, and possessing the requisite qualifications, whether rich or poor, is a corporator, and entitled to an equal vote in the administration of its affairs. So too, if it is a private corporation, *prima facie*, the same parity exists. In joint stock companies, the owner of one share or action of the capital stock, is, in general, a member of the company; a corporator; and as such, entitled to, and cannot be denied, the entire rights and privileges of a member.

Angell & Ames on Corporations, 62. Those rights and privileges, are definite and certain; they cannot be greater or different in one member, than they are in another. In *Rex v. Ginever*, 6 *T. R.* 735, the power of making by-laws, was delegated by the charter, in very comprehensive terms. A by-law, giving to the senior bailiff a casting vote in case of a tie, was held to be illegal. So a by-law, imposing an oath of office, where none was required by the charter, was declared to be invalid. *Rex v. Dean*, &c. 1 *Str.* 536. So a by-law, restricting or extending the right of admission as a member, or of eligibility to office, or prescribing new or additional tests, or qualifications to voters, is illegal. *Rex v. The Wardens*, &c. 7 *T. R.* 743; *Rex v. Tapenden*, 3 *East*, 186; *Rex v. Spencer*, 3 *Burr.* 1833; *The People v. Tibbits*, 4 *Cowen*, 358; *The People v. Kip & al.* 4 *Cowen*, 382 *in note*; *Angell & Ames on Corporations*, 192; *ibid.* 182, &c. But the by-law contended for in this case, is as obviously a violation of the charter, as were those in the cases just cited. The charter, if not in terms, yet in its spirit and legal intendment, gives each member the same rights, and consequently, but one vote: whereas, this by-law, gives them unequal rights, and an unequal number of votes. It makes one a member for one purpose, and another a member for another purpose. It imposes a test or qualification unknown to the charter, by which to determine how many votes a member may give; whether one, five, ten or fifty. In short, a by-law excluding a member from office, or from the right to vote at all, unless he owns five, or ten, or twenty shares, would not be a more palpable, though it might be a more flagrant violation of the charter. A man with one share, is as much a member, as a man with fifty; and it is difficult to perceive any substantial difference between a by-law, excluding a member with one share from voting at all, and a by-law reducing his one vote to a cipher, by giving another member fifty or a hundred votes.

The legislature have thought proper, in some instances, to annex certain and different degrees of rights, to certain and different quantities of property; sometimes they have given by express enactment, one vote for each share, and at other times, they have graduated the number of votes, by giving for each share not exceeding five or ten, one vote each, and then diminishing the number of votes as the number of shares are increased; but this charter is silent upon the subject, and therefore, the by-law is illegal and void.

2d. By the very terms of the charter, this question is completely put at rest. The first section incorporates the individuals by name, who were then the proprietors of the bridges; thereby conferring upon them severally, equal corporate rights and privileges, and making them, collectively, a corporate body. The second section authorizes the company to purchase, and with the consent of "a majority of the body," to sell real estate, &c. The third section appoints the president, secretary, &c., by name, to continue in office until others shall be appointed in their places "by a majority of the stockholders, at a meeting of the

said stockholders;" and then adds, "the said corporation or a majority thereof," may appoint annually, &c. And by the fourth section, the power to make by-laws is given to "the said corporation or a majority thereof."

In the first place, it is obvious to remark, that this charter incorporates certain individuals by name; that they therefore, and their successors and assigns, collectively constitute "the corporation," "the body," politic and corporate. When, therefore, the second section speaks of the consent of "a majority of the body," what "body" does it mean? The answer is inevitable; "the corporate body," "the body," politic and corporate. But what composes that "body"? The aggregate amount of property? or the collective number of individual proprietors who were incorporated? Manifestly the latter. The corporation property is not, in any sense, "a body" politic. "A majority of the body" then, can only mean, a majority of the individuals comprising that body. The third section is, if possible, more explicit, and admits of no doubt. The officers named, are to continue until others are appointed — how? By "a majority of the stockholders," not by the holders of a majority of the stock. The difference between the two forms of expression, is too palpable to admit of illustration. To consider them as meaning one and the same thing, would be to confound all language and destroy the use of terms. The distinction is plainly recognized, not denied by the court in *Gray v. L. & S. Turnpike Co.* 4 Rand. 578, *Angell & Ames on Corporations*, 290. But it is said the term stockholders, is not used in the general authority subsequently given in the third and fourth sections, to appoint officers, and ordain by-laws. That is true, but the terms used, viz.: "The said corporation or a majority thereof," evidently mean the corporators, or a majority of them, unless the property constitutes the corporation, and not the stockholders.

There is nothing then in this charter to change the common law rights and relative influence of the individual corporators. No rights or privileges are annexed by it to any specific or designated quantity of interest. It does not give the election of officers, and the control of the property to a minority of the corporators, as the by-law in question may do, and in practice as it seems by depositions, generally has done. If the charter gave to the stockholders a vote for every share, then they might claim and exercise that right, not on the mere ground of membership, but as a special chartered privilege. It was insisted, however, at the bar, that the legislature recognized the company when the act of incorporation was passed in 1797, with their by-laws and usages as they then existed; that the charter was in the nature of a legislative confirmation of their pre-existing by-laws and regulations, one of which was, that members might vote by proxy, and have one vote for every share they owned. That, therefore, their right to do so, is a chartered right. This argument is too broad. If true, in its extent, the company could not repeal or modify any of its pre-existing

rules. They have, upon this principle, become a part of the charter, part of its fundamental constitution, and cannot be changed, unless the charter gives the corporation power to do so. This it does not do. On the contrary, in terms, as well as on general principles, it restrains them from making any by-laws repugnant thereto. It is true, if an ancient, or other existing corporation, accepts a charter of confirmation, their rights, regulations and ancient usages, will not be superseded or impaired, except so far as the same are altered by, or repugnant to the new charter. *Newling v. Francis*, 3 T. R. 196; *Rex v. Westwood*, 7 Bing. 1; *S. C.* 20 Eng. Com. Law Rep. 11, &c. But this is not a charter of confirmation; it is an original charter, creating and giving life to what did not before exist. If, therefore, this corporation has now any by-laws in force, on the subject of elections, or in relation to any other matter, it cannot be because such by-laws existed prior to the charter; but because the corporation, since its creation, has adopted them, either by a formal act of legislation, or by tacitly conforming to such pre-existing regulations; and in either case, their legality and validity are liable to be questioned in this, and in other courts of competent jurisdiction. However prudent and advisable, it is not necessary, that a corporation should ordain its by-laws by a formal act of legislation, nor that they should reduce them to writing, unless required to do so by the charter: and this is all that is proved by the cases cited on this point. *Angell & Ames on Corporations*, 179, &c.; *Union Bank of Maryland v. Ridgely*, 1 Har. & Gill, 324; *Rex v. Ashwell*, 12 East, 22; and see *United States v. Fillebrown*, 7 Peters U. S. Rep. 28; *U. S. v. Dandridge*, 12 Wheat. 69. Neither can the argument founded on the uniform practice and usage of this company, be maintained. It can have no prescriptive rights founded on immemorial usage; and the validity of any other must depend upon the charter. If that is ambiguous, or doubtful, usage may help us to fix the construction, but cannot alter its terms or change its fundamental constitution. *Rex v. Miller*, 6 T. R. 268; *Rex v. Varlo*, Cowp. 248, 250; *Rex v. Ashwell*, 12 East, 22; *Angell & Ames on Corporations*, 64. Finally: the by-law in question is not authorized by the charter; is inconsistent with the popular spirit and design of the institution; is not essential or necessary to effect the object the legislature had in view; is contrary to the great principles and policy of our laws; and is not even for the *apparent* good of the company itself. It is, therefore, void. The object of the legislature was, to give permanency and protection to the public improvement that had been erected, and security to the individuals who had embarked in the enterprise. Instead of promoting and securing these legitimate designs, the tendency, at least, the *apparent* tendency, of the by-law in question, is to encourage speculation and monopoly, to lessen the rights of the smaller stockholders, depreciate the value of their shares, and throw the whole property and government of the company, into the hands of a few capitalists; and it may be, to the utter neglect or disregard of the public convenience and interest. I do not

say, that such was the design, or that such has been the effect; but only, that the natural or probable tendency of the by-law in question, is to produce such a result.

If the by-law, allowing votes by proxy and a plurality of votes, had been a legal one, the vote repealing it, or rejecting the proxies, at the time of the election, could not have been justified or sustained; but as the by-law was illegal and void in itself, the proxies and the excess of votes, were properly rejected; and the application to set aside the election, must be denied. Void things are as no things; this is a universal rule. 22 *Vin. Abr.* 13, *pl.* 16, 17; *Cable v. Cooper*, 15 *Johns. Rep.* 157.

I have not reached this conclusion, without the most serious and solemn consideration of the subject; and I may add, not without some reluctance, since a contrary practice has so long prevailed in this company. But my solemn conviction is, that *Ita lex scripta est*. The application must be denied.

[The concurring opinion of FORD, J. is omitted.]

RYERSON, J. gave no opinion, as the cause was argued before his appointment. *Application refused.*¹

COMMONWEALTH v. BRINGHURST.

1883. 103 *Pa. State*, 134.²

ERROR to Court of Common Pleas, No. 2, of Philadelphia County.

Quo warranto by the Commonwealth of Pennsylvania, *ex relatione* John P. Verree *et als.*, against Bringhurst *et als.* to determine the right of the defendants to hold the office of directors of the Philadelphia Iron & Steel Company, a corporation chartered by special Act of April 12, 1867 (P. L. 1211).

The suggestion of the relators set forth, in substance, that at the annual meeting certain votes by proxy were received by the inspectors of election under protest; that the inspectors refused to count any of the votes thus given by proxy; that the defendants, who had received a majority of the votes given by stockholders in person, were declared

¹ "It seems that, at common law, each shareholder is entitled to cast but one vote, irrespective of the number of shares which he holds; but there are good reasons for holding that this rule has no application to ordinary joint-stock business corporations at the present day.—The custom of giving the shareholders in such companies a vote for every share has become so well established, that it is fair to imply an intention to follow this custom in the absence of any indication to the contrary. It is generally provided by statute [a general law applicable to all private business corporations], or by express provision in the articles of association of a corporation, that the shareholders shall be entitled to a vote on account of each share." 1 Morawetz on Private Corporations, Section 476 *a.* — Ed.

² Statement abridged. Part of argument omitted. — Ed.

elected directors; whereas if the votes given by proxy had been counted together with the votes given in person the relators were elected.

Defendants demurred.

The court below sustained the demurrer and entered judgment for defendants.

R. C. Dale and *Samuel Dickson* for plaintiffs in error. The rule of the common law, established when municipal, religious, and charitable corporations were alone known, has no application to trading or monied corporations where the relation of the members is not personal. In the former, the units are persons, in the latter the units are shares. *State v. Tudor*, 5 Day, 329. The case of *Taylor v. Griswold* (2 Green, N. J. 223) manifests a narrow adherence to common-law doctrines, and the other cases cited on the other side are not authorities. *Philips v. Wickham* (1 Paige, 590, 598) was the case of a quasi municipal corporation. *Brown v. Commonwealth* (3 Grant, 209) was decided on an express limitation in the charter, and *Craig v. Church* (7 Norris, 42) was the case of a religious society. An examination of the general legislation of this State shows that the legislature regarded the right of shareholders to vote by proxy as an inherent right without special enactment [citing various Acts]. In all business transactions what one does by another he does himself, and what he can do himself he can do by another. Story on Agency, § 3. If a vote cannot be given by proxy, the Guarantee Trust Company, which is the largest holder of this stock, is disfranchised, for a corporation can only act through an agent.

George R. Van Dusen and *W. Heyward Drayton*, for defendants in error.

[Argument omitted.]

MERCUR, C. J. The relators are stockholders of the Philadelphia Iron and Steel Company. It was incorporated by special Act of 12th of April, 1867.

The contention is, whether the stockholders may vote by proxy, in the annual election of officers of the corporation?

Section 2 of the Act declares "the affairs of said company shall be managed by a board of five directors. one of whom shall be the president, who shall be chosen by the stockholders. All elections shall be by ballot, and every share of stock upon which the required instalments have been paid, shall entitle the holder thereof to one vote." Section 3, inter alia, authorizes the corporation to "make all needful rules, regulations, and by-laws for the well ordering and proper conduct of the business and affairs of the corporation. Provided the same in no wise conflict with the constitution and laws of this State or of the United States."

The charter in no wise refers to voting by proxy. No by-law has been adopted authorizing the stockholders to so vote.

In the absence of any express authority in the charter, and without any by-law authorizing it, the question is whether the stockholders

may vote by proxy. In other words, is it a power necessarily incident to the corporate rights of the stockholders?

A corporation is the mere creature of the law. It cannot exercise any power or authority other than those expressly given by its charter, or those necessarily incident to the power and authority thus granted, and therefore, in estimation of law, part of the same. *Wolf v. Goddard*, 9 Watts, 550; *Diligent Fire Co. v. Commonwealth*, 25 P. F. Smith, 291.

The right of voting at an election of an incorporated company by proxy is not a general right. The party who claims it must show a special authority for that purpose. Angell & Ames on Corporations, § 128; *Phillips v. Wickham*, 1 Paige's Cases in Chancery, 590. In this case, Chancellor WALWORTH says, the only case in which it is allowable at the common law is by the peers of England, and that is said to be in virtue of a special permission of the King. He adds: "It is possible that it might be delegated in some cases by by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting." In the *People v. Twaddell*, 18 Hun, 427, it was held, a stockholder cannot so vote unless expressly authorized by the charter or by-laws. *Taylor v. Griswold*, 2 Green (N. J.) 222, holds that a right of voting by proxy is not essential to the attainment and design of a charter, and even a general clause therein authorizing the company to make by-laws for its government was insufficient of itself to give that right. In *State v. Tudor*, 5 Day (Conn.) 329, there was no clause in the charter authorizing the stockholders to vote by proxy; yet the company made a by-law authorizing them to so vote. The validity of this by-law was sustained by a majority of the court. So in *People v. Crassley*, 69 Ill. 195, effect was given to a by-law of the corporation, authorizing voting by proxy, the by-law not being in conflict with the Constitution and laws of the State.

That a right to vote by proxy is not a common-law right, and therefore not necessarily incident to the shareholders in a corporation, appears to have been recognized in *Brown v. Commonwealth*, 3 Grant, 209, and in *Craig v. First Presbyterian Church*, 7 Norris, 42.

The selection of officers to manage the affairs of this corporation requires the exercise of judgment and discretion. They must be elected by ballot. The fact that it is a business corporation in no wise dispenses with the obligation of all the members to assemble together, unless otherwise provided, for the exercise of a right to participate in the election of their officers. Although it be designated as a private corporation, yet it acquired its rights from legislative power, and it must transact its business in subordination to that power. As then the relators cannot point to any language in the charter expressly giving a right to vote by proxy, and it is not authorized by any by-law, they have no foundation on which to rest their claim. Judgment was correctly entered for the defendants on the demurrer.

Judgment affirmed.

STONE, C. J., IN MACK v. DEBARDELEBEN COAL AND IRON CO.

1890. 90 *Alabama*, 396, pp. 401-404.

MANY other questions material to the future government of the Eureka Company have been well and ably argued, and we feel it our duty to notice some of the more important of them. In the act to amend the charter of said company, approved December 6, 1873 — Sess. Acts, 139 — is this language: “No stock [holder], either in his own right, or as proxy or agent for others, shall be entitled to cast more than one-fourth of all the votes at any election of directors.” This clause is set forth in the amended bill, and is in that way brought before us. We hold this language means one-fourth of all the votes the shares of stock authorize to be cast. One-fourth of the votes in the Eureka Company, with its present number of shares, is 2,077.

It is averred, and not denied, that the DeBardeleben Company, as a corporation, is the owner of more than 4,600 of the Eureka shares. The amended bill charges that “the defendant, H. F. DeBardeleben, as president of the DeBardeleben Coal and Iron Company, and acting as president of Eureka Company, and David Roberts, as secretary of both of said companies, and with the knowledge and consent and connivance of the defendant A. T. Smythe, a short time prior to the 19th of January, 1890, had a large lot of the stock of the Eureka Company, . . . which was owned and held by the DeBardeleben Coal and Iron Company, . . . transferred into their individual names, that is to say: they had transferred to each of the following persons, who were at that time directors of the DeBardeleben Company, or large stockholders in said company, the following number of shares: H. F. DeBardeleben, 500 shares; David Roberts, 500 shares; A. T. Smythe, 360 shares; M. B. Lopaz, 423 shares; Robert Adger, 300 shares; A. M. Adger, 300 shares; F. J. Pelzer, 300 shares; leaving in the name of the DeBardeleben Coal and Iron Company 1,990 of the 4,623 shares: . . . that the said stock so transferred . . . was, and is now, the stock and property of the DeBardeleben Coal and Iron Company; . . . that the transfers to said persons were so made . . . for the purpose of avoiding and getting around the section of the charter and by-laws of said Eureka above set out. Said transfers of said stock were so made in fraud of the minority stockholders of said Eureka Company, and to enable all of said stock to be voted in the interest, and for the benefit of the DeBardeleben Coal and Iron Company.” The substantial averments of fact in the foregoing extract are not denied in the answers.

It is contended for appellees that the said transferees of the DeBardeleben Company's stock in the Eureka Company are of right entitled to vote the several shares standing in their names, notwithstanding the statutory inhibition copied above. They rely on the following authori-

ties as supporting their contention: *In re Stranton I. & S. Co.*, 16 Eq. Ca. L. R. 559; *Pender v. Lushington*, 6 Ch. Div. L. R. 70; *Moffatt v. Farquhar*, 7 Ch. Div. L. R. 591; *Camden & Atl. R. R. Co. v. Elkins*, 37 N. J. Eq. 273. The English authorities quoted do lend some countenance to their argument, but we can not follow them. The New Jersey case is not fully in point. We think the statutory restraint on the voting power of the stockholders was enacted for very wise and conservative purposes, and that it should be upheld in its integrity. It is perhaps to be lamented that our organic law does not contain a provision applicable to all business corporations aggregate, that no one person, whether natural or artificial, can ever exercise a controlling voice in their organization or government.

Giving due consideration to the sworn denials and averments of the answers in this case, we find no ground for imputing vicious purposes in the government of the Eureka Company; but the power one corporation acquires by the ownership of a majority of the stock of another corporation, with which it has business connections, opens an inviting door for very pernicious possibilities, which the virtues of the manipulators and speculators have not always enabled them to withstand. The provision we are considering was conceived in the interest, and for the protection of minority stockholders, and deserves to be upheld with a strong hand. The highest function of the law is the protection of the weak against the mighty.

On principle, it would seem that the restrictive clause in the amended charter of the Eureka Company is too pronounced and emphatic to be disobeyed, or evaded. What can not be done directly, can not be accomplished by indirection. No one, except in matters of official trust, can confer on another authority to do what he can not do himself. What one does by another, he does by himself. But we are not without authorities in support of our views. *Campbell v. Poultney*, 6 Gill & Johnson, 94, presented the identical question we have in hand. The question arose on a bill filed to prevent gratuitous transferrees of stock, made that the stock might be voted in the interest of the transferor, who still remained the owner, from voting such stock as an independent stockholder. The court ruled that the transferor could not increase his voting power by any such device, and chancery would enjoin the casting of a greater number of votes than the transferor himself could have cast. In *Webb v. Ridgely*, 38 Md. 364, the same doctrine was asserted. — 2 High on Injunctions, § 1231. In *State ex rel. Danforth v. Hunton*, 28 Ver. 594, a proceeding by *quo warranto* to test the question of the election of certain persons as directors of a bank, similar principles were declared. It was ruled that, when the transferor could not vote the stock, his gratuitous transfer to another, that the latter might vote it in his interest, and according to his wishes, conferred on that other no greater power than he himself could exercise. The court, among other things, said, "The law is not to be outwitted by cunning devices."

Our conclusions are, that neither the DeBardleben Company nor any other stockholder of the Eureka Company, can, either directly or indirectly, vote more than one-fourth of all the votes at any election of directors; that in a proper case chancery will enjoin that company from casting more than one-fourth of the votes; that if, by reason of votes cast in excess of this restriction, any person or persons are declared elected directors, on a proceeding in *quo warranto* the illegal votes will be disallowed; and if such disallowance reduces the number of votes cast for such director or directors below a majority of the votes lawfully cast, then a judgment shall be awarded against them, removing them from said office or trust.

VANDERBILT v. BENNETT.

1889. 6 Pa. County Court Reports, 193.¹

, 029-10-5
Voting Trusts.

BILL IN EQUITY. Exceptions to master's report, C. P. No. 1, Allegheny County.

The bill was filed by Cornelius Vanderbilt against Bennett *et als.*, to restrain defendant from exercising the voting power incident to 2,000 shares of stock in the Pittsburgh & Lake Erie R. R. Co., owned by plaintiff; and to restrain them from interfering with plaintiff in the exercise of his rights of ownership thereof. Defendant filed an answer. The cause was referred to C. S. Fetterman, Esq., as master, whose findings of fact were, in part, as follows:

October 20, 1877, an agreement in writing was entered into by various stockholders of the railroad company, including William H. Vanderbilt, who then owned 2,000 shares. By this agreement all the shares of the subscribers were to be registered in the names of trustees, and these trustees and their successors were to have perpetual power to vote upon the same; and were to vote with a view to carry out certain objects and policies defined in the agreement. Certificates were to be issued, and were issued, to Vanderbilt and other subscribers giving them all the rights of stockholders except the right to vote upon the stock, and reciting that the perpetual power of voting is vested in the trustees.

At the death of William H. Vanderbilt, in 1886, the 2,000 shares became vested in Cornelius Vanderbilt, whose right to vote upon the same was denied at the annual election in 1887.

No consideration passed between the subscribers to the trust agreement or between them and the trustees; and the defendants, who were the trustees at the time suit was brought, claimed no interest in the stock covered by the agreement, except the right to vote it.

The Act of Assembly of Pennsylvania, of February 19, 1849, to

¹ Statement abridged. — Ed.

which the Pittsburgh & Lake Erie R. R. Co. was subject, provides, that at all general meetings or elections by the stockholders, each share of stock shall entitle the holder thereof to one vote; and that no proxy shall be received, unless the same shall have been executed within the three months preceding such election or general meeting.

The master's conclusions of law were:

1st. That the trust agreement is invalid as creating an unlawful combination and against public policy.

2d. That if the said agreement is such as can be legally sustained, it is simply a power of attorney or proxy, and revocable at the option of any party to it.

The master's opinion on the second point is, in part, as follows:

Ordinarily the authority of an agent is subordinate to that of his principal. Whether the agency be created by parol, or by writing under seal, unless it be coupled with an interest in the agent in the property, which would be detrimental to him should a revocation be attempted before the objects of the said letter of attorney or trust — whatever it may be — be accomplished, the agency is revocable at any time by the principal or by the death of the principal. We have in this case an agency created, and, as stated by the paper itself, a perpetual agency, in a certain body of men designated as trustees, for the purpose of voting and controlling the stock of the parties subscribing to the paper hereinbefore referred to, without any other or further duty to be performed in regard to the stock, excepting as specified in said paper. The trustees themselves have no interest whatever, financial or otherwise, in it, and no right to control the transfer or disposition thereof in any wise whatsoever. The trust raised by the said paper, if any, is simply and purely a dry trust, if we may so call it, leaving or giving no functions whatever for the trustees to perform, except the simple voting of the stock subscribed in said paper and in accordance with the vote they may cast to control the organization and policy of the said company. It is common sense and common law that the power or authority of the agent cannot be greater than that delegated to him by his principal.

[After quoting from *Griffith v. Jewett*, Superior Court of Cincinnati, 15 Weekly Law Bulletin, 119, and *Hafer v. Jewett*, 14 Weekly Law Bulletin, 68, the master proceeds:]

Every proxy, although by its terms irrevocable, is revocable unless coupled with an interest. Story on Agency, s. 476.

The principal may revoke the authority of his agent at his mere pleasure if the agent has no interest in its execution, and there is no valid consideration for it. It is treated as a mere nude pact and is deemed in law to be revocable upon the general principle that he alone who has an interest in the execution of an act is also entitled to control it. *Blackstone v. Buttermore*, 53 Pa. 266; *Hartley & Minor's Ap.*, 53 Pa. 212; also see *Walker v. Dennison*, 86 Illinois, 142; *McGregor v. Gardner*, 14 Iowa, 340; *Hunt v. Rousmanier*, 8 Wheaton, 201.

To constitute a power coupled with an interest, the interest must be in the subject-matter on which the power is to operate, and not in the mere results of its execution. *Hartley & Minor's Ap., supra.*

There is no consideration whatever between the trustees and the subscribers; none is claimed or mentioned in the agreement itself, and as between the subscribers themselves, there is also none. The mere fact that several or a majority have signed does not furnish a supporting consideration. 16 Ohio, 27; 41 Ohio, 527; 131 Mass. 528.

No one subscriber acquired under the agreement any interest in any other one stock or an undivided interest in the whole of the stock represented by the subscribers. No real and special consideration is claimed, and without this the agreement cannot be supported. An agreement of shareholders not to sell, pledge or give proxy for their shares, except by concurrent consent, is void without such consideration. *Fisher v. Bush*, 35 Hun (N. Y.), 641.

The entire beneficial interest in the stock is severally vested in the subscriber, the voting power in the trustees, and does not differ materially from what it would be if the stockholders retaining their shares had simply united in a proxy authorizing the trustees to cast the vote of all of them. *Griffith v. Jewett, supra.*

The master is, therefore, of opinion, that said paper called a deed of trust, if valid, is in effect, nothing more than a power of attorney, or proxy, given for the purpose of carrying out the designs of the parties therein mentioned, and as such, revocable at the pleasure of any party to it. And under all the facts of the case the complainant is entitled to relief, and [the master] would recommend a decree therefor as prayed for in the said bill of complaint.

To this report the defendants excepted.

George Shiras, Jr., Jarvis M. Adams, and Stevenson Butler, for the exceptions.

John Dalzell, and Knox & Reed, contra.

STOWE, P. J. The questions involved in this controversy are of the gravest character, and should have had a more deliberate and careful consideration, both by the master and the court, than either have had time to bestow upon it. The former has had four or five days to prepare his report, and the latter one day to consider the exceptions. It is hoped that this will be sufficient apology for any short-comings in the one and the want of an extended opinion by the other sustaining the views entertained by the court in this matter. We think that the trust agreement in question is absolutely void as contrary to public policy, and because it substantially amounts to a repeal of our Act of Assembly in regard to the right to vote incident to the ownership of railroad stock. But whether this be so or not, which, as the case stands, is not judicially before us for our determination, we are of the opinion that it is at least revocable by the plaintiff, and has been duly revoked so far as his stock is concerned, and, therefore, the exceptions to the master's report are now overruled, and decree in accordance herewith *pro ut*.

But we are also of opinion that under the circumstances of this case the plaintiff should pay the costs of this proceeding.

NOTE. An appeal to the Supreme Court from the decree entered in accordance with this opinion was *non prossed* at October Term, 1888, it being understood that the parties had agreed upon a settlement.

SHEPAUG VOTING TRUST CASES.

1890. 60 Conn. (*Supplement*), 553.¹

Superior Court, Fairfield County, October Term, 1890, before ROBINSON, J.

TWO SUITS in equity, brought by William H. Starbuck and others against the Mercantile Trust Company and others, and by Jabez A. Bostwick and others against George D. Chapman and others, (the defendants being with a few exceptions the same in both cases,) to the Superior Court in Fairfield County, and heard before *Robinson, J.* The cases involved the same general facts and were tried together.

The facts found by the court were, in part, as follows: —

The Shepaug, Litchfield, & Northern Railroad Company was chartered by the legislature in 1887, with a capital stock of 12,000 shares.

In March, 1889, George D. Chapman, one of the defendants, and certain persons whom he associated with himself in the enterprise, conceived the idea of obtaining control of a majority of the capital stock of the Shepaug Company, and, under such control, of extending the Shepaug road to a connection, at tidewater, with the New York, New Haven, & Hartford Railroad at Saugatuck in this state. Their real purpose in obtaining this control, and the real ends which they had in view and desired to attain thereby, were the above mentioned extension of the Shepaug road, and the building of other branches for the Shepaug Company, and the making of a profit for themselves out of the construction contracts therefor, which, in that position of control, they might dictate or cause to be entered into with the Shepaug Company. These profits were not to be shared with other stockholders, but to go to Chapman and his associates exclusively. To carry out this purpose Chapman and his associates formed a syndicate, under a partnership agreement, the terms of which were that the partners should furnish what money was necessary to purchase 6100 shares of the stock of the Shepaug Company for \$200,000, and 5900 other shares of the same stock, if required, at the rate of \$20 per share; and also to furnish what money should be necessary to make such exten-

¹ Statement abridged. Portions of opinion omitted. — Ed.

sion and to build other branches; and, further, that the 6100 shares should be placed in a voting trust, to last till a consolidation of the Shepaug Company with some other railroad company, or for five years, unless sooner terminated by unanimous consent of all the parties holding trust certificates issued by the trustees; and that the profits to accrue from the building of the proposed extension and branches should go to this partnership, to be shared *pro rata* according to their contribution to this partnership fund.

The members of the partnership purchased 8601 shares of Shepaug stock, which shares were transferred to the Mercantile Trust Company under a trust agreement which Chapman and his associates selected as the instrument by which to carry out the object of their partnership agreement. This trust agreement is dated April 26, 1889. The parties to this agreement were Chapman and his associates, party of the first part; the Mercantile Trust Company, party of the second part; and Clemens, Robinson, and L. T. Chapman, "the committee," party of the third part.

Under the trust agreement, "trust certificates" were issued by the Mercantile Trust Company upon all but 116 shares of the stock so placed in trust.

Almost immediately after the Chapman partnership had obtained a controlling interest in the stock of the Shepaug Company, they took the direction of the affairs of the company. Through this voting trust a majority of the directors were taken from the members of the partnership. The voting power under the voting trust was used at the annual meeting of the stockholders in November, 1889, and it is proposed to use it at another annual meeting.

The greater part of the trust certificates have now passed out of the hands of the partnership. The present plaintiffs are now the owners of trust certificates representing 7000 shares of the stock of the Shepaug Company, and are also owners of 3300 shares of the capital stock which never went into the trust. The greater portion of the plaintiffs' purchases of trust certificates and shares of stock were made between June 6th and 17th, 1890. The latest purchase was made Aug. 7, 1890.

The plaintiffs knew of the trust agreement, and its terms as they appeared on the face of it. They also knew the terms of the trust certificates when they purchased them. But none of the plaintiffs knew of the terms of this partnership, or knew that such terms entered into and secretly formed a part of the trust agreement, as they in fact did [i. e. as between the members of the partnership].

Aug. 21, 1890, the directors of the Shepaug Company passed a vote authorizing the execution of the Ripley construction contract for the building of a railroad by Ripley to be paid for in bonds or cash of the company. The sum of \$35,000 out of the Shepaug bonds, the Ripley contract provides shall go to George D. Chapman, agreeably to a vote passed by the directors at the same meeting of Aug. 21, 1890.

The trust agreement, so far as Chapman and his associates and the committee are concerned, originated in, and had as its prominent factors, secret and improper objects, terms, and purposes, which continued down to and entered into the making of the Ripley contract. The latter contract was entered into to serve purposes of private and personal advantage to Chapman and his associates and the committee. It was injurious and oppressive to the Shepaug Company and its stockholders; and was entered into by the directors with full knowledge that it was of this character. The directors, when they authorized the payment to Chapman of \$35,000 in Shepaug bonds, had knowledge that it was not due for any debt of the Shepaug Company.

The plaintiffs have notified the Trust Company that they revoked their powers under the trust agreement. On September 12, 1890, the plaintiffs Starbuck and Bostwick tendered and offered to surrender to the Trust Company the trust certificates held by them, and made a demand for an equal number of shares of the stock of the Shepaug Company. The Trust Company declined to transfer such stock to them.

S. E. Baldwin, and C. C. Beaman, for plaintiffs.

G. Stoddard, C. H. Blair, C. C. Keeler, C. A. Seward, H. Stoddard, C. C. Higgins, and W. B. Glover, for various defendants.

ROBINSON, J.

In the Starbuck case the court is asked to decree a permanent injunction against the Mercantile Trust Company to restrain it from voting on the stock standing in its name, at any future meeting of the Shepaug Company, according to the direction of the committee named in the trust agreement, or in any way except as authorized by the true owners of the stock respectively; and a permanent injunction against the Shepaug Company, to restrain it from receiving any such votes. The court is also asked to issue an order that the Trust Company transfer to the plaintiffs respectively the stock, now standing in its name, which is equitably owned by the plaintiffs respectively. And there is also sought an injunction to restrain Harold Clemens, Marcus W. Robinson, and Lucian T. Chapman, the members of the committee, from attempting to perform any further acts under said contract and power of attorney.

In this case it is found that the plaintiffs have in fact revoked the voting power in the trust agreement; but the defendants claim that as a matter of law they cannot do this. The character of this trust, so far as the Trust Company is concerned, is a dry trust. The Trust Company has no beneficial interest whatever in the shares of stock which are made the subject of the trust. They have no interest in favor of which they can claim a continuance of the trust. Neither has the committee named in the trust any interest which they, as such committee, can set up for the continuance of the trust. This committee or a majority of them are made an attorney to determine how the Trust Company shall vote in matters coming up in stockholders' meetings.

So I say this committee, as such, has no interest that it can set up for a continuance of the trust. It has no beneficial interest in the subject matter of the trust, and in fact no powers, duties, or functions in the trust other than above stated.

But it is said that this voting trust is to run five years, and that during the five years the voting power is not revocable except by unanimous consent of all holders of trust certificates. Can this be insisted upon against the demands of these trust certificate holders? Cannot these certificate holders revoke this voting power, notwithstanding this provision in the trust agreement?

The court in the case of *Griffith v. Jewett et al.*, 15 Weekly Law Bulletin, 419, recently held the following language in a case similar in some respects to this one: "If such demand be not complied with, the party holding the entire beneficial interest in the stock cannot cast the vote thereof, while it may be voted upon by one having no interest in it or in the company; and so it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably vested in others. It seems clear that such a state of affairs would be intolerable, and is not contemplated by the law, the universal policy of which is that the control of stock companies shall be and remain with the owners of the stock. The right to vote is an incident of the ownership of stock, and cannot exist apart from it. The owners of these trust certificates are, in our opinion, the equitable owners of the shares of stock which they represent, and being such, the incidental right to vote upon the stock necessarily pertains to them. They may permit the trustees, as holders of the legal title, to vote in their stead if they choose; but when they elect to exercise the power themselves, the law will not permit the trustees to refuse it to them."

The propriety and soundness of the doctrine of this case, and the necessity of its application, can have no better or more forcible illustration than in the facts and situation of the matter before us. The plaintiffs own 10,300 shares of the stock of this Shepaug road or its equivalent, and, if the contention of the defendants be sound, are shut out for several years from any voice in the election of officers and in the policy and management of the corporation.

If I follow the doctrine of this case, as I feel compelled to, the conclusion must be that these plaintiffs, in the absence of any other well grounded objection, have the right to revoke the voting power in this agreement.

But it is said that the case of *Griffith v. Jewett* differs from this, in that the power in the former case was irrevocable, while in this it is to last for a term of years only, and, being such, is not against the policy of the law.

It seems to the court that the surrender by a stockholder of his power and right to vote on his stock for the term of five years is contrary to the policy of the law of this state. Were this a power of,

attorney in formal terms, no claim would be made but that it was not only contrary to the policy of the law of this state, but in direct conflict with our statute, which says that "no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting; and no such power shall be used at more than one annual meeting of such corporation." Gen. Statutes, § 1927. This statute tends to disclose what the policy of the law of this state is, touching the matter of the surrender by a stockholder of his voting power to some one else. It would seem that it is opposed to such surrender for an indefinite period or for a period of five years. Evidently it was thought a longer surrender of the voting power would result disastrously in many ways.

It cannot be denied that as much disaster might follow to the business and the finances of a corporation and the interest of stockholders, where the voting power is yielded up in a five years voting trust, as by a five years power of attorney. The difference between an irrevocable power and a power irrevocable for five years, is a difference in degree and not in principle. A five year voting power, irrevocable for that time, would furnish time enough and opportunity enough to realize all the evils which our one year statute is manifestly intended to guard against.

It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.

And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow-stockholder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with

just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow-stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow-stockholders. For these reasons I hold that this trust agreement is void as against the policy of the law of this state.

And why is not the voting power surrendered in this trust agreement the equivalent of a power of attorney, and why has not the right of this Trust Company and this committee to control and cast the vote upon this stock, if at any time they had any legal right to exercise it, ceased to exist? It is now more than one year since the voting power was executed, and that power has been used already at one annual meeting. Why is not this voting power in this trust agreement, and the attempt of this trustee and this committee to exercise it now, a disobedience of our one year statute above quoted?

It is claimed that it is not a power of attorney because the Trust Company holds the legal title to the stock. It is said that the right to vote on the stock is not dissociated from the legal title to the stock in this instance. But does this reply quite answer the objections created by the facts in the case, and is it quite true that the voting power here is not dissociated from the legal title? An examination of the trust agreement discloses that the Trust Company is a mere agent, with no beneficial interest in the stock. It holds the title, but the real owner is somebody else. The Trust Company is simply the hand to cast such ballot as this committee directs. The committee is also but an agent, but without the legal title to the stock or any title to it. It is the head, and the Trust Company is the hand; simply that. The committee direct, control, and select what vote shall be cast, and are the agents and attorneys to perform this very essential part of the act of voting.

The trust company is one of the parties to the trust agreement, and it holds the legal title to the stock, and as such holder of the legal title it has in this trust agreement surrendered all a voter's power except the mere manual act of casting the selected ballot. It has in this trust agreement in effect surrendered to this committee the power to select the ballot. It has conceded to this committee the power to demand that it shall vote as they direct. What remains then in this trustee of the voting power, beyond being the mere hand, the use of which this committee is given the right to demand for this purpose at any stockholders' meeting? Is not the full voting power to all intents and purposes in this committee, and is it not so by delegation? It seems to me that the voting power in this trust agreement falls within the spirit and intent of the prohibition of our statute heretofore referred to, and

is terminated by lapse of time and the use of it already at one annual meeting.

It is insisted that there is nothing illegal, *per se*, in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations, and when this is all there is to the scheme; but when underlying that pooling contract there is between the members of the syndicate, who are directors or a majority of the directors of the corporation, a secret agreement which enters into this pooling contract, and forms the object of its creation, and by which they are to take to themselves the profits arising from such extension, or from the contracts which they as directors make, elements of unfairness and opportunity for fraudulent and dishonest practices are introduced, which the court cannot too severely condemn. Such a pooling contract or voting trust is in violation of the most elementary principles of law governing the dealings of trustees with trust property and their *cestuis que trust*.

But it is said that the purchaser of a trust certificate becomes a partner in the original partnership by express agreement in the trust certificate, and is therefore bound, not only to carry out the partnership agreement, but also, if the partnership is to be wound up, to bring all partners into court for a distribution of the assets. The principal factor in this claim is that the purchaser of one of these trust certificates becomes, by express agreement in the certificate, a partner in the original partnership. Neither the trust certificate nor the trust agreement contains any reference to any partnership or the terms of any partnership; neither contains any statement that any such partnership ever existed. This court cannot declare these plaintiffs parties to a partnership agreement, about which, or its terms, they never heard and never knew until they were disclosed on the trial. But it is insisted that in the trust agreement is placed the form of the trust certificate, which contains a clause which recites that the holder of the certificate, by accepting the certificate, duly assents to the trust agreement. Now it seems to the court that the most that can be claimed from this is, that the holder of the trust certificate assented to the terms of the trust agreement as they appeared on the face of it, and not to the underlying secret partnership agreement. The holder of each trust certificate, by the terms of the certificate, is to receive his dividends upon it, as for the number of shares of stock represented by his certificate; and upon the determination of the trust is to receive just as many shares of the capital stock as his trust certificate names. There is no hint that he may receive any less, or that an accounting of partnership matters may be required, or that his interest may be or is likely to be diminished, or that his shares of stock, as represented by the trust certificate, are to be subject to any obligation or losses of any partnership. In short the trust certificate represents and is evidently intended to represent, each holder's separate and distinct number of

shares of the stock put in trust. The trust certificates were individual property as soon as they were issued to an individual, and represented so much individual ownership of stock that was tied up in a voting trust, the ownership of which stock could be evidenced in no better or more satisfactory manner; and if the certificates were individual property and represented so much individual ownership of stock, this stock so represented was not partnership property, and the purchase of a trust certificate under these circumstances could have no effect to make the buyer a partner in a partnership whose terms and existence he was not apprised of. These plaintiffs, I am satisfied, are not partners in this syndicate, and the stock represented by their holdings of trust certificates is not subject to partnership claims or inquiry.

In the Starbuck case the court orders a permanent injunction to issue against the Mercantile Trust Company to restrain it from voting on the stock of the Shepaug Company, in its name, at any future meeting of said company, according to the direction of the committee named in the trust agreement, or in any way except as authorized by the true owners of the stock respectively.

The court further orders a permanent injunction to issue against the Shepaug Company to restrain it from receiving any such vote.

The court orders that the trust company transfer to the plaintiffs respectively the stock now standing in its name, of said railroad company, which is equitably owned by the plaintiffs respectively and is represented by the trust certificates which the plaintiffs hold; but upon what terms, if any, such transfer shall be made, the court will determine after hearing the claims of the Mercantile Trust Company with reference to such matters.

The court also orders a permanent injunction to issue to restrain Harold Clemens, Marcus W. Robinson, and Lucian T. Chapman, the committee named in the trust agreement, from attempting to perform any further acts under said trust agreement and power of attorney.

SHELMERDINE v. WELSH.

1890. 20 *Philadelphia Reports*, 199.

COURT of Common Pleas, No. 2, Philadelphia.

MOTION for an injunction. Opinion delivered January 13, 1890, by

HARE, P. J. The complainants moved on Saturday for an injunction to stay or regulate an election which was to occur on the following Monday. The argument closed at three o'clock. The facts were complicated, and there is but little aid to be derived from precedent.

Time is wanting to give details or make the thorough survey which might be desirable, but the case is substantially as follows: The Reading Railroad had long been laboring under financial difficulties; it was heavily encumbered and the prospects of paying its debts remote. Nor was this all; the claims of the creditors were in many respects antagonistic as to priority or debatable on other grounds, and some of them threatened to institute proceedings for foreclosure. Such a course might prove injurious to those who adopted it and prejudicial to rival claimants, and would certainly involve protracted litigation and preclude the stockholders from retrieving their affairs. Judicious minds, therefore, inclined to a compromise, and a scheme was devised which seems to have been wise and just, and was certainly inspired by a sincere desire to allay the discord that marred the prospects of the railroad company.

These are the main outlines: The creditors' securities and the certificates of the stockholders were to be placed in the keeping or under the control of persons selected with the consent of all concerned, and known as the Reconstruction Board, with power to adjust priorities, fix or reduce the rates of interest, execute mortgages, give liens in lieu of those surrendered, and issue new certificates of stock. The plan was made known to the stockholders and creditors, who for the greater part, ratified it by depositing their securities and certificates, but the Board was armed with a large discretion in the choice of the means of carrying it into effect. They were, however, to act with the advice and consent of another body designated collectively as the "Voting Trust." This consisted of four persons named by syndicates representing different interests, who were to complete their number and guard against the possibility of a tie, by adding a fifth — a duty which remains unfulfilled. The work of reconstruction might, as it was hoped, and the event proved, be completed in less than a year, and the company launched for a new voyage that would prove more fortunate than the first. Whether such a result could reasonably be expected would, however, depend on the persons who stood at the helm, and here arose a difficulty that could not readily be overcome.

The creditors were more immediately interested in the result than the holders of the stock, which had for many years been barren, and with every care could not bear fruit at once. Still the right to elect the President and Managers of the railroad could not legally be lodged with them, and they were naturally averse to having it in the hands of the stockholders, because, among other reasons, the shares were much below par, and might, as experience had shown, be bought up by persons having no interest in the road, with a view to promoting their own views or those of rival companies. It was, therefore, decided, with the assent of a great majority of both creditors and stockholders, that the Voting Trust should have a two-fold function. They were in the first place to supervise the reconstruction of the railroad company, and when that was accomplished the certificates of stock were to be

transferred to them, in order that they might use the votes so conferred for the election of a President and Managers, who would, in their judgment, conduct its business for the best interests of the creditors and shareholders. They were to hold the legal title to the stock, which was to be entered and transferred only on their books, but they were also to give the persons who had surrendered their stock to promote the work of reconstruction, certificates that the beneficial interest was in them, devoid of the right to vote. The complainant, Shelmerdine, holds such a certificate for a thousand shares of stock, and contends that so much of the scheme above set forth as vests the legal title in the Voting Trust is void, as placing the railroad under the control of men who have no interest in its fortunes or are not the real owners of the stock. It is, as he contends, at best an elaborate proxy, which fails in not having been executed within the last six months.

In considering this question I may begin with a proposition which no one is likely to dispute. Under the statutes of this State, and on general principles, the right to vote on stock cannot be separated from the ownership in such sense that the elective franchise shall be in one man and the entire beneficial interest in another, nor to any extent, unless the circumstances take the case out of the general rule. It matters not that the end is beneficial and the motive good, because it is not always possible to ascertain objects and motives, and if such a severance were permissible it might be abused. The person who votes must, consequently, be an owner, but it does not follow that he must be the only one. If, for instance, stock is pledged as a collateral, whether the debtor or creditor shall vote depends on the terms on which the pledge is made. The power is, under these circumstances, necessarily to some extent severed from the ownership, and the parties may, consequently, determine on which side it shall lie. So much is conceded on each side of this controversy, and the question is, can the debtor and creditor agree to lodge the vote in some one who is to act for both so long as the debt remains and the stock is held as security for its payment?

The counsel for the Reading Railroad contend that such a course is not forbidden by any rule or principle. In their opinion there is no reason that forbids a stockholder to transfer his shares to one man as a security for a debt due to another, with a stipulation that the holder shall have the right to vote, and the case would be the same although the intermediary gave the debtor a certificate that the equitable ownership was in him subject to the payment of the amount due. No authority directly in point has been cited on either side, but we incline to think that this view is correct and rules the case in hand. It has, indeed, been argued for the complainants that the power conferred on the members of the Voting Trust is not coupled with an interest; that they have a dry legal title, with no active duties to perform; and that they should be compelled to transfer the shares standing in their names to the persons who are the beneficial owners.

We think that this view errs in looking solely towards the stockholders. They are not the only persons beneficially interested in the railroad; the lien creditors are also owners, and, if harmony be not preserved, may possess the whole. It was therefore necessary to have some arbiter to reconcile interests which were jarring and might diverge, and the want was supplied by the Voting Trust. To decide that the election must be held exclusively on behalf of the holders of the stock certificates would frustrate rather than give effect to the principle that the votes should be cast by those who have a substantial interest in the result. It is not easy to discern how the position of the members of the Trust differs from that of an individual to whom stock is transferred as a security for a debt to a third person. The only duty of such a holder is to keep the certificate safely until the debtor pays or is in default, and then hand it over to whichever party is equitably entitled. Had the duties of the Reconstruction Board and Voting Trust been confided to a single body, with authority to secure the creditors by executing mortgages and then hold the stock, with a right to vote in the way best calculated to promote the common good, it could hardly have been said that there were no active duties to uphold the Trust or that it came to an end when the mortgages were executed. If this would have been the rule in the circumstances above supposed, it does not, we think, vary the case that the end was sought to be obtained through two closely related Boards, one supplementing and operating as a restraint on the other. Without pronouncing an opinion on a point which remains open for consideration on the final hearing, it is enough to say that the case is not sufficiently clear to warrant a preliminary injunction that would prevent an election on the day named in the charter, and might cause the irreparable injury which such remedies are given to prevent.

There is another point which may be touched lest it should seem to have been overlooked. The Voting Trust was originally intended to have five members. There are but four, one of whom, as it has been sworn, stands aside and will take no part in the coming election. The injunction affidavit avers that the remaining three intend to choose one of their number as President of the railroad. We do not wish to be understood as implying that such an election will be valid or can stand. Even if, as we think, the power of the Trustees to elect is, from its nature, and because it concerns the public, one that may be exercised by a majority, it is still held in trust, and the votes cast should be disinterested and without personal bias. The question whether one of the Trustees can vote for himself is not, however, raised by the bill or presented in the prayer for relief, and we do not, therefore, think it necessary to form or express an opinion as to the law.

J. G. Johnson, for plaintiff.

Richard L. Ashhurst and Geo. F. Baer, for defendants.

MOBILE AND OHIO R. R. CO. v. NICHOLAS.

1893. 98 *Alabama*, 92.¹

APPEAL from Mobile Chancery Court.

Bill in equity by stockholder in Mobile & Ohio R. R. Co. against the railroad company, the Farmers' Loan & Trust Co., *et al.*

In 1876, the railroad company was in the hands of a receiver; decrees of foreclosure had been rendered in suits on mortgages; and its total indebtedness largely exceeded the value of the entire railroad property. An arrangement was made between the creditors and the company whereby the creditors accepted debentures in lieu of their original evidences of debt; and the great majority of the stockholders, in effect, conferred upon a trustee irrevocable power to vote upon the shares so long as any of the debentures should be outstanding. The shareholders assigned their stock to the committee of reorganization; the committee gave the Farmers' Loan & Trust Company an irrevocable power of attorney to vote upon the stock so long as any of the debentures should be outstanding. The shareholders who had thus assigned their stock to the committee received in exchange new certificates entitling them to all the rights and privileges which pertain to the ownership of the said shares, saving and excepting that such ownership is subject to the power heretofore granted by the owners of said shares to the Farmers' Loan & Trust Company, in trust for the security of the debentures, to vote upon said shares.

Under the foregoing adjustment, all the creditors, except those secured by newly issued first mortgage bonds, accepted the debentures provided for, in lieu of their former evidence of debt; the foreclosure decrees were assigned to the Farmers' Trust Company; the receiver, under the orders of the court, turned the property over to the railroad company; and the corporation resumed its control and management of its property and business.

In 1892, the plaintiffs denied the authority of the Trust Company, under the power of attorney held by it to vote their stock, and claimed for themselves the right to vote their own stock. The right of plaintiffs to vote at the stockholders' meeting was denied. Thereupon plaintiffs filed the present bill; praying, among other things, that the Farmers' Loan & Trust Company be enjoined from voting on the stock under the power of attorney; and that the railroad company be enjoined from refusing to accept the votes of plaintiffs and of other stockholders.

A preliminary injunction was granted. The defendants moved to dismiss the bill for want of equity, and to dissolve the injunction. The Chancellor overruled the motions. From his decrees an appeal was taken.

¹ Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — Ed.

E. J. Phelps, and *Fred. W. Whitridge*, for railroad company, appellants.

E. L. Russell, and *R. P. Deshon*, for appellants.

Hannis Taylor, for Farmers' Loan & Trust Co., appellants.

H. C. Tompkins, *Gaylord B. Clark*, *William J. Curtis*, and *Alfred Juretzki*, for appellees.

COLEMAN, J. [After stating the case.] The facts stated in the bill show, that by the reorganization and compromise of 1876, perfected in 1879, the voting power was severed from the stockholder, and until the payment of the debentures, irrevocably vested in the Farmers' Trust Company and the debenture holders. It is contended for complainants that the agreement was, and "is void *per se*," because 1st: "It contravenes the language of the charter of the railroad company; and 2d, because it is against public policy."

The charter expressly provides, "Each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person, or by lawful proxy."

So far, then, as the right to vote by proxy is questioned, the charter expressly grants the power, and the legislature has thus declared that it is not unlawful, *per se*, to separate the voting power from the stockholder, so far as the appointment of a proxy may be considered a severance of the voting power. Where a proxy is duly constituted, and the power of the appointment is without limitation, a vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. We do not hold that a power of attorney, absolute in its terms, will authorize the agent or proxy, to effect contracts, or legalize acts, outside of the scope of his authority, or contrary to law or public policy, neither could the stockholder in person by his vote effectuate such a result. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground, that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end, attempted to be effected by the exercise of the voting power. The distinction should be kept in view. Take the case of the *Richmond & Danville Extension Company v. The Woodstock Iron Co.*, 129 U. S. 643, cited by complainant. The Woodstock Iron Co. agreed to pay thirty thousand dollars, if the Georgia Pacific Railroad was run through the town of Anniston, where the Woodstock Iron Co. owned a large plant, mines, and other property. The contract was held void as being against public policy. No question of the separation of the voting power from the shareholder, arose in the case. It was the character of the contract, the unlawful purpose in view, to build up the Woodstock Iron Co. at the expense of the stockholders of the railroad company that was condemned. The same principle applies to many other cases cited in which, it was held, "that contracts made to influence railroad companies in selecting their routes and erecting their

depots and stations by donations in land and money to some of its directors and stockholders were invalid," citing *Bestor v. Wathen*, 60 Ill. 131; *Linden v. Carpenter*, 62 Ill. 307.

Take the case of *Hafer v. N. Y., Lake Erie & Western R. R. Co.*, 14 Weekly Law Bulletin, p. 68. The case is thus stated: "A controlling interest in the stock of the Cincinnati, Hamilton, and Dayton Railroad Company was bought up in 1882, and placed in the name of H. I. Jewett, who was Vice-President of the New York, Lake Erie, and Western Railway Co., under the agreement that he should give irrevocable proxy to such persons as the Erie should appoint to vote on the stock; that his stock certificates should be left in the hands of trustees, and that they should issue to the respective owners of the stock trust, or pool certificates for amounts equal to their respective equitable interest. On all stock thus pooled, the Erie agreed to guarantee a certain dividend."

The court declared the contract void "both on the ground that the power is denied to one corporation thus to acquire control of another, and that the stockholder can not barter away the right to vote upon his stock." True the opinion declares as an independent proposition, "that the stockholder can not barter away the right to vote upon his stock," and yet it is shown, by the facts of the case and the opinion, that the purpose to be effected by the barter of the right to vote, to wit, the placing "of an Ohio corporation into the hands of a New York corporation," the enabling "one corporation to acquire control over another" was illegal. Speaking of the facts of the case the opinion proceeds as follows: "It is obvious that the rule as to executed contracts can not be applied to the plaintiff for any such reason as that last mentioned, *for he was not a party to the contract*. There are other cases wherein special circumstances made it imperative, as a matter of good faith, that the contract should not be interfered with, and others, when the protection of interest acquired by innocent parties caused the court to refrain." There is no rule of law which requires contracts to be upheld which are void as against public policy, in order to preserve "good faith" or "innocent parties." The rule of estoppel is often applied to prevent undue advantage by one person over another, but the rule does not extend to contracts which are void because contravening public policy. Considering the opinion as an entirety, we do not regard it as authority to the proposition, that an agreement which provides for a separation of the right to vote from the holder of the stock is "*per se*," at all times and under all circumstances contrary to public policy and void. We have examined case after case and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not sanction if the principal had voted and not a proxy; and in cases of a mere dry trust, it is held that the stockholder might revoke a power of attorney in form irrevocable. The doctrine as to dry trust does not arise in this case.

Certainly the case of *Griffith v. Jewett*, 15 Weekly Law Bulletin, 419, or of *Moses v. Scott*, 84 Ala. 608, do not sustain complainants' contention in this respect. If there were no precedents, upon principle, we would hold that in determining the validity of an agreement, which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties, neither will it annul them except to preserve its own majesty, and to conserve the greater interest of the public. Let us examine the conditions of the parties, the purpose in view and effect of the agreement of 1876, consummated in 1879, the consideration and interest surrendered and rights acquired by the readjustment, and issue of the debentures, the position of the complainants thereto, and the results of holding that reorganization, *per se*, void.

The complainants belong to the class known as "Assenting Stockholders." They surrendered their stock to the committee of reorganization in order that the power of attorney, executed to the trust company by the committee of reorganization, might be executed, and that the debentures should be issued to the creditors of the railroad corporation. The certificates of stock held by them show, upon their face, that they are subject to the power of attorney and to the rights of the debenture-holders. At the time the plan of adjustment was agreed upon the railroad company was in the hands of a receiver. Decrees of foreclosure rendered against the company. The indebtedness far exceeded the value of the railroad company's property. The execution of the decrees of foreclosure, by a sale of the property, and the prosecutions of the admitted claims against the railroad company, would necessarily have transferred the property to other parties and wiped out every vestige of present available interest or right of the stockholder, or hope of future profit. The creditors held the vantage ground, and in law their rights and interest were paramount to the stockholders. The latter might accept propositions but were in no position to dictate terms. These were the circumstances under which the settlement and agreement was made. Stated in short, the compromise and settlement led to the issue of the debentures to the creditors in lieu of their original evidences of debt, and a mortgage upon certain property to secure them. a plan for a sinking fund for their benefit, and the right and privilege under an irrevocable power of attorney to vote the stock *until the debentures were paid*. The power of attorney was not in perpetuity, or absolute, but only until the debentures were paid, and a fair construction under the circumstances required that the voting power should be used fairly and honestly to this end, or as stated in the agreement itself, "for the uses and purposes declared in said memorandum, and until the same are fully accomplished." In consideration therefor the decrees of foreclosure, at first suspended, were transferred to the trust

company, creditors surrendered their claims and accepted in lieu thereof the debentures, the receiver under the orders of the court restored the property to the Mobile & Ohio Railroad Co., which resumed management and control of its property and affairs, and the stock preserved to the stockholder.

To this agreement over forty-five thousand out of a total of about fifty-three thousand of shares of stock assented, and among those which assented were complainants. The creditors had the right to accept debentures for their debts. The agreement continued in existence the corporation and preserved to the stockholders their stock. It did not violate the charter of the railroad corporation. The purpose was legal, the means used did not contravene any statute of the State or principle of public policy, and was within the scope of the power of the contracting parties. Good faith on the part of the assenting stockholders, whose interests were thus preserved, and to those who accepted the debentures in lieu of other evidences of debt and securities, and to those who have since purchased them upon the faith of the plan of compromise demand that the terms of the contract be fulfilled. Tested by any principle of law, legal or equitable, the agreement was not only valid but fair at least to the corporation company and stockholders.

[It was contended that the acceptance by the creditors, under an arrangement made in 1887-1888, of general mortgage bonds, extinguished the debentures issued under the previous settlement; and that thereby the stockholders became reinvested with the voting power which they had relinquished for the benefit of the debenture holders. The Court *held*, that the acceptance of the general mortgage bonds, under the conditions and terms then specified, did not effect an extinguishment of the debentures.

It was also contended, that the agreement by which the stockholder parted with his voting power created the relation of surety and creditor between the stockholder and the debenture holder; and "that the voting trust has been terminated by the extension and enlargement of the debt, and by the substantial modification of the terms upon which the voting franchise was to be exercised." The Court *held*, that the relation of surety and creditor did not exist.]

A decree will be here rendered dissolving the injunction granted upon the original bill, and dismissing the original bill for want of equity.

DURKEE v. THE PEOPLE EX REL. ASKREN.

1895. 155 *Illinois*, 355.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. THOMAS M. SHAW, Judge, presiding.

In this *quo warranto* proceeding the circuit court of Peoria county overruled a demurrer to the information, and rendered final judgment of ouster and for costs against Edward H. Durkee, the defendant. An appeal to the Appellate Court for the Second District resulted in a judgment of affirmance. This further appeal was then taken.

The opinion filed in the Appellate Court was as follows:

“CARTWRIGHT, J.: An information in the nature of a *quo warranto* was filed, in pursuance of leave granted for that purpose, upon the relation of F. M. Askren, against Edward H. Durkee, the appellant, to contest the right of appellant to hold the office of director of the Toledo, Peoria, and Western Railway Company. A demurrer was interposed to the information, and the demurrer being overruled, appellant elected to abide by it, and judgment of ouster and for costs was entered against him.

“The facts appearing in the information which it is necessary for us to state, are as follows: The Toledo, Peoria, and Western Railway Company was organized March 28, 1887, under the general law of this State for the incorporation of railway companies, with a capital stock of \$4,500,000, for the purpose of constructing a railroad from the eastern boundary line of the State, at a fixed point, westerly through certain counties to the western boundary line of the State at the city of Warsaw, and also, by a branch, from LaHarpe to Burlington, in the State of Iowa. At the time of such organization, Charles Moran and Thomas Denny, of the city of New York, owned a railroad which answered the description of such proposed railroad, and formerly known as the Toledo, Peoria, and Western railroad, which they proposed to sell to the Toledo, Peoria, and Western Railway Company. Their proposition was as follows: ‘The undersigned hereby subscribe for 44,991 shares of the capital stock of the Toledo, Peoria, and Western Railway Company, amounting to the sum of \$4,499,100 (the shares being \$100 each): *Provided, always*, and this subscription is made only upon one condition: that the manner and terms of payment hereinafter specified are by the board of directors and the incorporators, and the remaining stockholders of said company, accepted as a part of this contract of subscription.’ The terms of payment hereinbefore referred to are as follows:

“‘The subscribers shall convey, by proper indenture of deed or bill of sale to the Toledo, Peoria, and Western Railway Company, the railway now held by the subscribers, constructed in the State of Illinois, com-

mencing at the eastern boundary line of the State of Illinois, in the county of Iroquois, at a point where the present Toledo, Peoria, and Western Railroad Company connects with the Toledo, Logansport, and Burlington Railway Company, now called the Chicago, St. Louis, and Pittsburg railroad, in the State of Indiana, and to extend thence westerly through the counties of Iroquois, Ford, Livingston, McLean, Woodford, Tazewell, Peoria, Fulton, McDonough, Hancock, and Henderson, to the western boundary line of the State of Illinois at the city of Warsaw, and also at the town of Hamilton, on the Mississippi river, and also by a branch from LaHarpe to Burlington, in the State of Iowa; and in consideration therefor shall be paid the shares of stock hereinbefore subscribed for, and also 4500 of the first mortgage bonds of the Toledo, Peoria, and Western Railway Company, of \$1000 each, amounting to \$4,500,000, having thirty years to run and bearing interest at four per cent per annum, the said railway and property being estimated, accepted, and taken over by the Toledo, Peoria, and Western Railway Company at the value of \$8,999,100, the said amount to be represented by the said 44,991 shares of stock and said 4500 first mortgage bonds.'

"Said proposition of Moran and Denny was accepted June 25, 1887, by the incorporators, directors, and remaining stockholders of the railway company. The incorporators and first board of directors had before this time, on the day that the articles of incorporation were issued, adopted by-laws, among which were the following :

" 'No. 2. At all meetings of the stockholders the holders of bonds of the company which, by the terms of their issue, confer voting power, shall be entitled to vote on their bonds, — that is to say, one vote, either in person or by proxy, on every one hundred dollars of bonds owned for thirty days next preceding such meeting.'

" 'No. 5. At each annual meeting of the stockholders there shall be elected, by ballot, three directors to serve for three years, to fill the place of office of those whose terms shall then expire, and such further number of directors as shall be necessary to fill any vacancy.'

" 'No. 16. The stock of the company shall be transferable on the books of the company by the stockholders or their legal representatives, on surrender of the certificates or upon satisfactory proof of their loss, and in case of loss only upon the delivery of a bond of indemnity satisfactory to the executive committee or board of directors.'

"Upon the acceptance of the proposition of Moran and Denny, the incorporators, directors, and stockholders provided for the issue of 5000 bonds, of \$1000 each, maturing and bearing interest as stated in the proposition, and for making a mortgage or trust deed securing the same, and providing that the holder of each bond should have the right to vote thereon at all meetings of the stockholders, one vote for each one hundred dollars of said bonds. Afterward the railroad company issued the capital stock, in the sum of \$4,500,000, and executed 5000 bonds, of \$1000 each, as provided, and delivered to Moran and Denny \$4,499,100 of the capital stock and \$4,500,000 in bonds, retaining 500 bonds for

future use, and secured all said bonds by mortgage on the railway property, in which mortgage it was provided that the holders of bonds might vote at any and every meeting of the stockholders, one vote for every hundred dollars of bonds held by the person proposing to vote, for a period of thirty days prior to the holding of any meeting. The bonds issued contained a provision that the holders might vote as above stated, and the stock certificates contained a provision as follows: 'This certificate, and the stock represented hereby, is issued, received, and held subject to 5000 bonds, of \$1000 each, secured by a mortgage of all the property now owned or hereafter to be acquired by this company, and to said mortgage and to the right given in each of said bonds to the holder thereof to vote thereon at all the meetings of the stockholders of the company, one vote for each one hundred dollars of said bonds.' There was also a notation upon the certificate as follows: 'This stock is subject to bondholder's right to vote at all meetings of stockholders. Countersigned and registered. — The Corn Exchange Bank, Registrar of Transfers.'

"The relator became the owner of stock of the corporation by purchase, in the usual course of business, more than thirty days prior to an election held September 11, 1893, and at that election he and appellant were candidates for the office of director. Both were eligible, and votes were cast for each by holders of stock and holders of bonds. If the holders of bonds were entitled to vote, the appellant was elected; but if the agreement that they might vote was invalid, the relator was elected, as he received a majority of the stock vote. The by-laws adopted, as before stated, have ever since remained in force as by-laws of the corporation. The question to be settled is whether the bondholders had a right to vote, in pursuance of the by-laws and said agreement.

"The railway company had power to make by-laws not inconsistent with its charter or the purpose of its creation, nor repugnant to the common law, and was expressly authorized by its charter to establish by-laws for the management of its affairs according to law. It had no power, however, to change or abrogate any provision of the law of its existence by means of a by-law, and if the by-law empowering bondholders to vote at stockholders' meetings is in conflict with the law under which the corporation is organized, it is necessarily void.

"In the statute under which this company was organized the following provisions are found: —

"Sec. 8. All the corporate powers of every such corporation shall be vested in and be exercised by a board of directors, who shall be stockholders of the corporation, and shall be elected at the annual meetings of the stockholders at the public office of the corporation within this State.'

"Sec. 11. In case it shall happen, at any time, that an election of directors shall not be made on the day designated by the by-laws of such corporation for that purpose, the corporation, for such cause, shall not be dissolved, if, within ninety days thereafter, the stockholders

shall meet and hold an election for directors in such manner as shall be provided by the by-laws of such corporation: *Provided*, that it shall require a majority, in value, of the stock of such corporation to elect any member of such board of directors, and a majority of such board of directors shall be citizens and residents of this State.'

" 'Sec. 25. In all elections for directors and managers of such railway corporations, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.'

" Said section 25 was enacted in pursuance of section 3, article 11, of the constitution, which contains the same provision and prohibition concerning the election of directors by stockholders as section 25 of the statute.

" By these provisions the power to elect directors of the corporation was conferred upon the stockholders, and the exercise of the power was regulated. It may be conceded that the primary object of adopting the constitutional provision, and the like provision in the statute, was to protect minorities in bodies of stockholders; but that fact would not change or affect its force, for such object would be defeated by subjecting the right of stockholders to interference by the votes of bondholders unregulated by law. The by-laws in question would give the bondholders control of the corporation instead of the stockholders, for there was but \$4,500,000 of stock and \$5,000,000 of bonds. The amount of bonds delivered to Moran and Denny equalled the whole capital stock, and the exercise of the privilege of voting on the bonds so delivered to them would double the voting power authorized by law. No by-law could extend or restrict that power as fixed and regulated by the constitution and the charter. The by-law in question being in conflict with the constitution and statute, and against the policy of the State, and proposing an alteration of the charter and continued violation of the law, was void. *State of Nevada ex rel. v. Curtis*, 9 Nev. 325; *People ex rel. v. Fire Department*, 31 Mich. 458.

" The provision made by the corporation, and contained in the bonds and mortgage, that the holders of bonds might vote at any and every meeting of stockholders, is subject to the same objections as the by-laws. Being in violation of express statutory and constitutional provisions, the agreement was inoperative and void. *Penn v. Bornman et al.*, 102 Ill. 523; 2 Parsons on Contracts (5th ed.), 673.

" Nor has such agreement become binding by subsequent ratification, acquiescence, or estoppel. Whether bondholders have ever exercised the supposed right to participate in the management of the affairs of the corporation does not appear; but assuming that such is the fact, and

that they have been permitted to do so without objection, the agreement would not thereby become operative. A contract which the corporation could not make, it could not ratify or make valid by any subsequent act. If there was no power to make it, there would be equally a lack of power to confirm it. *Board of Commissioners, etc. et al. v. L. M. & B. R. R. Co. et al.*, 50 Ind. 85.

"In the transaction Moran and Denny subscribed for 44,991 shares of stock, which constituted the entire capital stock except nine shares, and the holders of those nine shares assented to the arrangement. All the stock, therefore, came either through Moran and Denny, or through the holders of the remaining nine shares, all of whom participated in the transaction. The condition that bondholders might vote was printed in the certificates, so that all holders had notice of the provision. But neither notice of nor assent to an illegal transaction, nor acquiescence, merely, on the part of a stockholder in acts in execution of such transaction, will prevent him from withholding further assent and preventing further execution of it, unless an estoppel can be evoked under some recognized rule of law. The mere fact of participation on the part of the corporation or stockholders in an agreement in violation of the charter could not produce that result, which would be, in effect, abrogating the charter. *Penn. v. Bornman*, 102 Ill. 523.

"There is no question of fraud or bad faith in this case. No one was deceived or misled as to any fact. It is to be observed that the right of bondholders to vote at stockholders' meetings was not made a condition in the proposition of Moran and Denny to the corporation. It was not a condition imposed by them, but appears to have been rather a matter of grace or favor to them. But if it were to be regarded as a condition of the contract of sale, its illegality arose from the fact that it was a violation of the statutes of the State, and a contract void as against a statute cannot become operative and valid through an estoppel. There is no estoppel against showing that a contract is invalid, as in violation of a statute or against public policy. *Brightman v. Hicks*, 108 Mass. 246; *Langan v. Sankey*, 55 Iowa, 52; *Tibble v. Anderson*, 63 Ga. 41.

"Corporations possess such powers, and such only, as are conferred upon them by the law of their creation. This corporation was organized under a general and public law of the State, which defined the lawful limits of its capacity. The parties who dealt with it are chargeable with notice of its powers and the limitations of its capacity, and cannot plead ignorance of the public laws and the constitution. No one could be deceived into the supposition that the corporation could lawfully make such a contract as the one in question, for the want of power to make it would be apparent from the public law. In such a case every person is bound, in dealing with a corporation, to take notice of the extent of its powers. *Pearce v. M. & I. R. R. Co. and P. & I. R. R. Co.*, 21 How. 441; *McGregor v. Official Manager of the Deal and Dover Railway Co.*, 16 Eng. L. & Eq. 180; *New Orleans, etc. Steamship Co. v*

Ocean Dry Dock Co., 28 La. Ann. 173; *Franklin County v. Lewiston Institution for Savings*, 68 Me. 43; *Davis et al. v. Old Colony Railroad Co.*, 131 Mass. 258; *Hackensack Water Co. et al. v. De Kay et al.*, 36 N. J. Eq. 548; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57.

“The cases cited by counsel for appellant in support of the proposition that a corporation is estopped from asserting that a contract is *ultra vires* where it has received a benefit under the contract, are cases where the making of such contract was within the scope of the corporate franchise, and the contracts were sought to be avoided because there was a failure to comply with some regulation, or the power was improperly exercised. In *Davis v. Old Colony Railroad Co.*, *supra*, it is said: ‘There is a clear distinction, as was pointed out by Mr. Justice CAMPBELL in *Zabriskie v. Cleveland, Columbus, and Cincinnati Railroad Co.*, by Mr. Justice HOAR in *Monument Bank v. Globe Works*, and by Lord Chancellor CAIRNS and Lord HATHERLEY in *Ashbury Railway Carriage and Iron Co. v. Riche*, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations in a peculiar instance, when such abuse or failure is not known to the other contracting parties.’

“No doubt a person dealing with a corporation, who finds the making of a contract to be within the scope of the corporate powers under the charter, has a right to assume that its officers, in the management of its affairs, have complied with all the conditions necessary to the exercise of the power. If the contract with the corporation can be valid under any circumstances, an innocent person has a right to presume the existence of such circumstances. In such cases the corporation and its stockholders may be estopped from avoiding the contract or denying the existence of the requisite conditions. This is the extent to which the cases cited go, and none of them hold that there can be an estoppel where the contract could not, under any conditions, be made by the corporation. To so hold would be equivalent to saying that a corporation could make any contract in excess of its powers and in violation of the laws and policy of the State, for no other reason than because it had made such contract. A usurpation of power where the other contracting party had full notice of the illegality of the act, would operate, under such a rule, to confer power. We do not think that such a rule could prevail.

“It is suggested that this contract might be operative to confer upon bondholders an equitable right to vote the shares of stock, but it is sufficient to say, respecting that claim, that such was not the contract. The contract was that they might vote as bondholders, and there was no intention of depriving stockholders of the right to vote.

“The judgment will be affirmed.”

Jack & Tichenor, for appellant.

A party dealing with a corporation will not be permitted, when he has received the benefit of the contract, to assert *ultra vires* as a defence. *Railroad Co. v. Thompson*, 103 Ill. 187; *Bradley v. Ballard*, 55 id. 413; *Building Society v. Crowell*, 65 id. 453; *East St. Louis v. Gas Light Co.*, 98 id. 415; *Darst v. Gale*, 83 id. 440; Spelling on Private Corp. sec. 775.

This is not so much a question of *ultra vires* as it is a matter of contract between individuals. For instance, the issuance of watered stock is said to be *ultra vires* and void, and preferred stock cannot be issued without statutory authority; but if the stockholders agree among themselves to the illegal issue they cannot thereafter complain. *Scoville v. Thayer*, 105 U. S. 143; *Lorillard v. Clyde*, 86 N. Y. 384; *In re Gold Co.*, L. R. 2 Ch. Div. 701; *Hazelhurst v. Railroad Co.*, 43 Ga. 13; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Taylor v. Railway Co.*, 2 L. R. Exch. 390; *Bissell v. Railroad Co.*, 22 N. Y. 269; *Whitney Arms Co. v. Barlow*, 73 id. 63; *Phosphate Co. v. Green*, L. R. 7 Com. Pl. 43; *Evans v. Smallcombe*, L. R. 3 H. L. 249.

A stockholder may be estopped from objecting to an amendment by his expressed or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment, bind him and bar his suit. Cook on Stockholders, sec. 503, and citations; *Branch v. Jesup*, 106 U. S. 468.

Relator should first purge the stock of the corporation from the cloud cast upon it by the contractual relations existing between the corporation, its bondholders and stockholders, before he can insist that the vote cast by the bondholders was illegal. Cook on Stockholders, sec. 297.

R. J. Cooney, State's Attorney, and *Stevens & Horton*, for appellee.
[Argument omitted.]

Mr. Justice BAKER delivered the opinion of the court.

We think that the opinion of the Appellate Court aptly and accurately states both the facts and the law of the case. In the brief and argument for appellant filed in this court. it is claimed that the reasons given by that court for the affirmance of the judgment are not satisfactory. The *gist* of this contention, as we understand counsel, is, that the judgments below are in direct antagonism to the plain provisions of a contract entered into by and between *individuals* in all respects fully competent to act in relation to the matter involved, and that to declare the contract void in this collateral proceeding is to impair the rights of contracting parties fully capable of contracting as between each other, and plainly in derogation of legal principles.

The several contracts here involved were not contracts between natural and individual persons. but all contracts to which the corporation was a party. The by-laws were established by the corporation itself, acting as a corporate body. The proposition of Moran and Denny to subscribe stock, and to transfer the already constructed rail-

road owned by them to the Toledo, Peoria, and Western Railway Company, was made to said company after its organization under the laws of the State, and was accepted by the board of directors and the incorporators and stockholders of that company, acting for and as that company; and the trust deed, bonds, and certificates of stock, which are the instruments under and by virtue of which the bondholders claim the right to vote at the meetings of the stockholders, are all instruments that were executed, issued, and delivered by the railway company. The supposed contract right to vote is based upon and grows out of instruments and contracts made by the company as a corporate entity, and not otherwise.

It is claimed by counsel that in *Lorillard v. Clyde*, 86 N. Y. 384, a like agreement with that here in question was held by the court to be valid. That case was wholly unlike this in many respects. The corporation was not a party to the contract there in suit. The agreement of June 14, 1874, was made prior to the organization of the corporation, and was made between the plaintiff, Lorillard, and the firm of Wm. P. Clyde & Co., and provided for a consolidation of business and property, and for the formation of a corporation and a corporate management of the consolidated business. It also contained numerous other provisions, and it was for a breach of some of these other provisions of that contract that the suit was brought. Another very material difference between the cases is, that there nothing was provided for in the agreement that was "inconsistent with the provisions of the statute or immoral in itself," while here, that which was provided for in the contract was explicitly prohibited both by the statute and the constitution of the State. An agreement to do an act forbidden by statute is not binding. (*Penn v. Bornman*, 102 Ill. 523; *Cincinnati Mutual Health Ass. v. Rosenthal*, 55 id. 85; *Rockhold v. Cuntun Masonic Benevolent Society*, 129 id. 440, and 26 Ill. App. 152.) And it would be absurd to say that either persons or corporations can abrogate such a statute, upon the theory of an estoppel, by simply contracting to do the prohibited act.

It is urged that Messrs. Moran and Denny received and held the stock of the company in terms *subject* to the right of the bondholders to vote, and that the relator herein, with full knowledge of the provision inserted in both bonds and certificates of stock, was enabled to purchase his stock at the depreciated value which it had by reason of the fact that it was taken and held *subject* to the right of the bondholders to vote; that the stock is subject to certain fixed conditions, which constitute an infirmity attached to the stock itself, and that when he purchased the stock he assumed and agreed to take and hold it subject to the right of the bondholders to vote at the meetings of the stockholders. And in the same connection it is also urged that Messrs. Moran and Denny sold these bonds upon the market; that the stipulation in question undoubtedly gave the bonds a market value which they otherwise would not have had, and that they, Moran and Denny, received whatever

enhanced value they were enabled to obtain by reason of the provision for the protection of the bondholders and the conservation of the capital invested by them in the enterprise, and that therefore Moran and Denny, as holders of the stock and the assignees of such stock, with knowledge of the provision inserted in the certificates of stock, should hold the stock subject to such provision. This seems to us to be a partial and incorrect view of the matter. Both the constitution of the State and the statute under which the railway company was organized make provision for the election of the directors or managers of all such companies by the stockholders, and further provide that "such directors or managers shall not be elected in any other manner." It is therefore to be presumed that the relator, when he purchased his stock, knew that the stipulation and provision in question were directly contrary to the constitution and statute, and consequently void, and for that reason was willing to pay, and did pay, a larger consideration for the stock than he otherwise would have paid. And the bondholders are also chargeable with notice of the requirements and restrictions of the public statute under which the corporation was formed, and were therefore bound to know, and did know, when they received or purchased their bonds, that the stipulation giving them the right to vote at any and every meeting of the stockholders was in palpable and absolute conflict with the prohibitions of that statute, and necessarily null and void.

The sections of the statute that are quoted at length in the opinion or the Appellate Court, indicate quite clearly that it is a part of the public policy of the State that the corporate business and affairs of railroad companies shall be managed and controlled by directors who are not only stockholders themselves, but who are likewise elected by the votes of those who are also stockholders. It is for the interest of the State and of the public that railroad companies be successfully managed, so that they will well and promptly perform the public duties that devolve upon them, and afford all necessary facilities for the safe transportation of persons and property. The interest of the shareholders depends upon the success of the corporation, and the public is interested in having railroad corporations managed and controlled by those who will profit by keeping up the property and by careful management, rather than by bondholders, whose interest, frequently, with a view to foreclosure and future ownership, lies in a depreciation in the condition and value of the property, and in a shrinkage in the revenues of the company. It would seem that a contract which annuls these statutory provisions is against public policy, and a fraud upon the statute under which the corporation is organized and from which it derives all its powers.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

BEATTY v. NORTHWESTERN TRANSPORTATION CO.

1884. (*Chancery Division of Ontario*), 6 *Ontario*, 300.

1885. (*Court of Appeal of Ontario*), 11 *Ontario Appeal*, 205.

1886. (*Supreme Court of Canada*), 12 *Canada Supreme Court*, 598.

1887. (*Judicial Committee of Privy Council*), *L. R. 12 App. Cases*, 589.¹

BILL IN EQUITY by Henry Beatty, a minority stockholder, against the North Western Transportation Company, and its directors, including James H. Beatty. The bill seeks to rescind the purchase by the corporation of the steamer *United Empire*. The defendants filed a statement of defence. The plaintiff joined issue, and the case was heard before BOYD, Chancellor.

The material facts are as follows : —

The Transportation Company is a corporation, with a capital stock of \$300,000, divided into 600 shares of \$500 each. On January 1, 1883, James H. Beatty owned 200 shares, and was a director. He was then building a steamboat, to be called the *United Empire*; and desired to sell it to the company. In January, 1883, he purchased 101 additional shares. On the day of the annual meeting in February, 1883, he transferred 5 shares to Rose and 5 to Laird, whereby they became qualified to be directors; and they were then elected directors. The board was composed of five directors; and James H. Beatty, Rose, and Laird constituted a majority.

The board of directors, while James H. Beatty was present and acting, passed a vote (called a bye-law) to purchase the steamboat of James H. Beatty upon specified terms. The directors, at the same time, voted to submit the said bye-law to a special meeting of the stockholders. At such meeting, a vote to adopt the bye-law was carried by a vote of 306 to 289. Of the 306 affirmative votes, 291 were cast by James H. Beatty, and ten by his transferees, Rose and Laird.

The bill charges that the purchase was not entered into by James H. Beatty *et als.* on behalf of the company in good faith for the purpose of promoting the best interests of the company, but for the purpose of serving their private interests contrary to their duty to the company and its stockholders. Subsequently all charges of fraud and collusion were abandoned. It was proved by uncontradicted evidence, and was substantially admitted, that, at the date of the purchase, the acquisition of another steamer was essential to the efficient conduct of the company's business; that the *United Empire* was well adapted for that purpose; that it was not within the power of the company to acquire any other steamer equally well adapted for its business;

¹ Statement compiled from the various reports. The greater portions of the arguments and opinions are omitted. — Ed.

and that the price agreed to be paid for the steamer was not excessive or unreasonable.

The case was heard in the Chancery Division, at Toronto, before BOYD, CHANCELLOR, who decreed that the purchase should be set aside. (6 Ontario, 300.)

The Court of Appeal of Ontario (HAGARTY, C. J., BURTON and OSLER, JJ.) unanimously reversed the decree of the Chancellor. (11 Ontario Appeal, 205.)

The Supreme Court of Canada (RITCHIE, C. J., FOURNIER, HENRY, TASCHEREAU, and GWYNNE, JJ.) unanimously reversed the last mentioned decision, and restored the decree of the Chancellor.

SIR W. J. RITCHIE, C. J. Though it may be quite true, as a general proposition, that a shareholder of a company, as such, may vote as he pleases, and for purposes of his own interest, on a question in which he is personally interested, does that proposition necessarily cover this case? Is it not abundantly clear that, whatever a simple stockholder may do, no director is entitled to vote, as a director, in respect to any contract in which he is personally interested? Directors cannot manage the affairs of the company for their own personal and private advantage; they cannot act for themselves and, at the same time, as the agents of the corporation whose interests are conflicting; they cannot be the sellers of property and the agents of the vendee; there must be no conflict between interest and duty; they cannot occupy a position which conflicts with the interests of the parties they represent and are bound to protect. Is it not somewhat of a mockery to say that this by-law and sale were invalid and bad, and not enforceable against the company as being contrary to the policy of the law by reason of a director entering into the contract for his personal benefit where his personal interests conflicted with the interests of those he was bound to protect, but that it can be set right by a meeting of the shareholders, by a resolution carried by the vote of the director himself against a large majority of the other shareholders? If this can be done, how has the conflict between self-interest and integrity ceased?

While recognizing the general principle of non-interference with the powers of the company to manage its own affairs, this case seems to me to be peculiarly exceptional; a director, acting for the company, makes a sale, acting for himself, to the company, a transaction admittedly indefensible; this purchase is submitted to the shareholders, and the director, having acquired a controlling number of votes for this purpose, secures a majority by his own votes thus obtained without which the purchase would not have been sustained, and confirms as a shareholder his invalid act as a director, and thus validates a transaction against which the policy of the law utterly sets its face.

It does seem to me that fair play and common sense alike dictate that if the transaction and act of the director are to be confirmed, it should be by the impartial, independent, and intelligent judgment of the disinterested shareholders, and not by the interested director himself, who should never have departed from his duty. If he had done his duty and refrained from acting in the transaction as a director the by-law might never have been passed, and the contract of sale never entered into; and having acted contrary to his duty to his co-shareholders he disqualified himself from taking part in the proceedings to confirm his own illegal act; and then to say that he was a legitimate party to confirm his own illegal act seems to me simply absurd, for nobody could doubt what the result in such a case would be, as the futility of the interested, but discontented, shareholders attempting to frustrate the designs of the interested director with his majority is too manifest; but he, if he had done his duty towards them and refrained from entering into the transaction, would never have been in the position of going through this farce of submitting this matter to the shareholders, and when so submitted of himself voting that he, though he had acted entirely illegally, had done right, and thereby binding all the other shareholders who thought the purchase undesirable; or in other words, by his vote carrying a resolution that the bargain he himself had made for the company as buyer, from himself as seller, was a desirable operation and should be confirmed.

I rest this case entirely on the position Beatty held as a director, and the duty which pertained to that office. In that view it is not necessary to discuss how far, or rather under what circumstances a shareholder may vote at a general meeting of shareholders on matters on which he is individually interested. I cannot, however, but look upon it as rather a bold and startling proposition that a shareholder should be able to offer a property for sale to the company from a bare majority of votes and by such vote, against the will of all the other shareholders, compel the company to become the purchaser at his own price and on his own terms, against the wish of all the other shareholders, who may, as in this case, be a minority of 289 votes against 306.

HENRY and GWYNNE, JJ., delivered concurring opinions.

The case was then carried by appeal to the Judicial Committee of the Privy Council.

Sir *R. E. Webster*, Attorney General, and *Jeune*, for appellants, contended that the judgment of the Court of Appeal was correct, and that of the Supreme Court should be reversed. The fiduciary position of J. H. Beatty as director had, it was submitted, nothing to do with the question. His vote as shareholder at the general meeting was the thing in dispute, whether he was prevented from giving it on a matter in which he was personally interested. As for his voting for the bye-

law at the directors' meeting it had no other object or effect than that of bringing the matter before a general meeting. At the most it was voidable and not void, and the question was as to the validity of its ratification, and that depended upon the validity of the appellant's vote as a shareholder. There is no principle of equity why a shareholder should be disqualified from voting at a general meeting, or why his vote should be examined and disallowed, except for fraud. The disqualification of directors results from their agency. The shareholders are principals. In this case if the majority were interested in the vessel sold, the minority were interested in a competing line and had interests adverse to the company; and the validity of their votes might also on the respondent's contention be examined on the ground of personal interest. The motives of shareholders for their votes cannot be inquired into. If there is no fraud they are free to exercise their own judgment as they please, and that exercise cannot be called in question by other shareholders. Reference was made to *Pender v. Lushington*;¹ *M'Dougall v. Gardiner*;² *East Pant Du United Lead Mining Company v. Merryweather*;³ *Mason v. Harris*.⁴

Sir Horace Davey, Q. C., and Bremner, for respondent.

[Argument omitted.]

SIR RICHARD BAGGALLAY.

The question involved is doubtless novel in its circumstances, and the decision important in its consequences; it would be very undesirable even to appear to relax the rules relating to dealings between trustees and their beneficiaries; on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company.

It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means.

The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J. H. Beatty possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the bye-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered, or to make a similar contract, which latter seems to have been

¹ 6 Ch. D. 73.

² 2 H. & M. 254.

³ 1 Ch. D. 13.

⁴ 11 Ch. D. 107.

what was intended to be done by the resolution passed on the 7th of February.

It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to shew that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the company itself.

But the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power; there was no limit upon the number of shares which a shareholder might hold, and for every share so held he was entitled to a vote; the charter itself recognised the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of the *United Empire* was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail; to reject the votes of the defendant upon the question of the adoption of the bye-law would be to give effect to the views of the minority, and to disregard those of the majority.

The judges of the Supreme Court appear to have regarded the exercise by the defendant J. H. Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law; their Lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views expressed by him in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection.

Their Lordships will humbly advise Her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that Court with costs; the respondent must bear the costs of the present appeal.

JESSEL, M. R., IN PENDER v. LUSHINGTON.

1877. *Law Reports, 6 Chancery Division*, 70, pp. 74-76.

JESSEL, M. R. This is a motion by Mr. *J. Pender*, on behalf of himself and all shareholders who voted with him against an amendment, and the *Direct United States Cable Company, Limited*, as Plaintiffs, against *E. H. Lushington* and other gentlemen as Defendants, in substance to obtain the opinion of the Court that certain votes at a general meeting on behalf of the Plaintiff were improperly rejected by the

chairman. That is the substance of the case, though there are other technical questions to which I must also refer.

In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise—that is as regards a Court of Law as distinguished from a court of morality or conscience, if such a court exists. I put to Mr. *Harrison*, as a crucial test, whether, if a landlord had six tenants whose rent was in arrear, and three of them voted in a way he approved of for a member of Parliament, and three did not, the Court could restrain the landlord from distraining on the three who did not, because he did not at the same time distrain on the three who did. He admitted at once that whatever the motive might be, even if it could be proved that the landlord had distrained on them for that reason, that I could not prevent him from distraining because they had not paid their rent. I cannot deprive him of his property, although he may not make use of that right of property in a way I might altogether approve. That is really the question, because if these shareholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it are entirely beside the question.

I am confirmed in that view by the case of *Menier v. Hooper's Telegraph Works*,¹ where Lord Justice *Mellish* observes: "I am of opinion that, although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration." In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote for motives or promptings of what he considers his own individual interest.

This being so, the arguments which have been addressed to me as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shews a want of appreciation of the

¹ Law Rep. 9 Ch. 350, 354.

principles on which this company was founded, appear to me to be wholly irrelevant. Therefore I do not intend to enter into the question as to what the objects of the company were, or what was the mode in which it was proposed to carry out those objects. I am only bound to decide whether or not these people were entitled to vote. To that question I am now going to address myself.

GUERNSEY *v.* COOK.1876. 120 *Mass.* 501.

COLT, J. The contract declared on has been held to be the personal contract of the defendant. 117 *Mass.* 548. It provided in substance on the part of the defendant and Mr. Beebe, who together owned a majority of the stock of the India Company, that the plaintiff should be made treasurer of that company at a stipulated salary; the plaintiff on his part agreeing to take part of their stock at par, with an agreement that it should be taken back and an allowance made for interest, "in case it should be desirable for any reason to dispense with the plaintiff's service as treasurer." The question is whether such a contract is void as being against public policy. Its decision depends upon the construction which must be fairly given to the terms of the contract.

In consideration of the purchase of a part of their stock at a price named, two of the stockholders agree to secure to the purchaser the treasurership of the corporation, of which they are members, and to secure to him also a sum named, as the annual salary of the office. The purchase of the defendant's stock and the agreement relating to the office are incorporated into the contract as part of one transaction; and each agreement is the valuable consideration of the other. The contract, if reasonably susceptible of two meanings, one legal and the other not, must indeed receive an interpretation which will support rather than defeat it, and the presumption is in favor of its legality. But this contract necessarily implies that the defendant intended to derive, and the plaintiff intended to give to him, a private advantage, not shared by the other stockholders, in consideration of his election as treasurer. And there is nothing in the facts disclosed at the trial to show that such was not in fact the result of the transaction, or that the agreement in question was known and consented to by the other members of the corporation.

It was the purpose and effect of the contract to influence the defendant, in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promisee was placed

under direct inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interests of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates.

In *Fuller v. Dame*, 18 Pick. 472, a contract was held to be contrary to public policy, and to open, upright and fair dealing, which tended injuriously to affect the interest of the corporations of which the promisee was a member. It was compared to the case of a composition deed where all the creditors release the common debtor upon the payment of a certain percentage, and where a stipulation for a separate and distinct advantage is held to be a fraud on other creditors and void. *Case v. Gerrish*, 15 Pick. 49. Upon the same principle, agreements not to bid against each other at a public auction, as well as agreements for the employment of underbidders and puffers, are held to be a fraud upon the bidders at the sale, and void as against public policy. So contracts with brokers or agents, upon a consideration founded on violations of duty to the principal, are void. *Smith v. Townsend*, 109 Mass. 500. *Phippen v. Stickney*, 3 Met. 384. *Gibbs v. Smith*, 115 Mass. 592. *Curtis v. Aspinwall*, 114 Mass. 187. See also *Waldo v. Martin*, 4 B. & C. 319; *Marshall v. Baltimore & Ohio Railroad*, 16 How. 314; *Elliott v. Richardson*, L. R. 5 C. P. 744.

Upon the facts disclosed, this action, which is not in avoidance but in direct affirmance of the contract, cannot be maintained. *White v. Franklin Bank*, 22 Pick. 181. The objection that the contract is illegal, although it comes with no good grace from the defendant, is allowed to prevail, not as a protection to him, but for the sake of the public good, and because the court will not lend its aid to enforce an illegal contract. *Myers v. Meinrath*, 101 Mass. 366. *Taylor v. Chester*, L. R. 4 Q. B. 309.

Judgment for the defendant.

J. G. Abbott & B. Dean, for the plaintiff.

B. F. Butler & J. A. Gillis, for the defendant.

CHAPTER XXV.
TRANSFER OF SHARES.

DUNCUFT v. ALBRECHT.

1841. 12 *Simons*, 189.¹

BILL IN EQUITY, praying that defendant be decreed to specifically perform an oral contract for the sale to the plaintiff of shares in a railway company.

Defendant demurred to the bill, for want of equity.

G. Richards, and *Mylne*, in support of the demurrer.

Secondly : the Court will not enforce the agreement in this case ; for shares in a railway company, fall within the description of goods, wares and merchandizes ; and, by the 17th section of the Statute of Frauds (29 Car. 2, c. 3) it is enacted that no contract for the sale of any goods, wares and merchandizes, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. In this case, none of those requisites has been complied with. Shares in a public company, have been held to be goods, within the purview of the 72d section of the Bankrupt Act (6 Geo. 4, c. 16). *Cooper v. Elston*;² *Smith v. Surman*;³ *Mussell v. Cooke*.⁴ All that the case of *Bradley v. Holdsworth*⁵ decides, is that railway shares are not an interest in or concerning lands, tenements or hereditaments, and, therefore, not within the 4th section of the statute.

Knight Bruce, and *Piggott*, appeared in support of the bill, but

¹ Statement abridged. Part of argument omitted. Only so much of the opinion is given as relates to a single point. — Ed.

² 7 T. R. 14.

³ 9 Barn. & Cress. 561. See the Judgment of *Littledale, J.*, p. 571.

⁴ Prec. Ch. 533.

⁵ 3 Mees. & Wels. 422.

The VICE CHANCELLOR [SHADWELL], without hearing them, said:

I do not feel any difficulty about this case; because I think that the verbal agreement, as it is stated, is quite sufficient.

In my opinion this is a case to which the 17th section of the Statute of Frauds does not apply; because it is impressed upon my mind that, in the decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares and merchandizes which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares and merchandizes within the meaning of the 17th section.

Then there is nothing, as I understand, either in the Statute of Frauds or in the law of this Court, which prevents the execution of such an agreement as is here stated: and, though it may be true that the Plaintiff has asked more than this Court would give or might give under certain circumstances; my opinion is that he has stated quite enough to show that he is entitled to some relief: ¹ and, therefore, the demurrer must be overruled.²

TISDALE v. HARRIS.

1838. 20 *Pickering* (Mass.), 9.³

ASSUMPSIT on an oral agreement of the defendant, to sell to the plaintiff two hundred shares, with all the earnings thereon, in a Connecticut corporation.

Verdict for plaintiff. Motion to set aside verdict. One ground of the motion was, because the contract set up was within the statute of frauds.

Bartlett and *F. C. Loring*, for the motion.

C. P. Curtis, and *B. R. Curtis*, *contra*.

SHAW, C. J. [After deciding another question.] But by far the most important question in the case, arises on the objection, that the case is

¹ See *Hibblewhite v. M'Morine*, 6 Mees. & Welsb. 200; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Ex parte The Lancaster Canal Company*, Montagu's B. C. 116; and *Humble v. Mitchell*, 2 Railway Cases, 70; S. C. 11 Ad. & Ell. 205.

² On the 23d of July, 1841, The Lord Chancellor affirmed the decision in the case above reported.

³ Statement abridged. Citations of counsel omitted. — ED.

within the statute of frauds. This statute, which is copied precisely from the English statute, is as follows: "No contract for the sale of goods, wares or merchandise for the price of ten pounds (\$33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agent, thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring State, for the price of more than ten pounds, and no part having been delivered, and no purchase money or earnest paid, the question is, whether it can be allowed to be good, without a note or memorandum in writing, signed by the party to be charged with it. This depends upon the question, whether such shares are goods, wares or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the *St. 29 Car. 2*, in the same terms, which ours has copied, has not been definitively settled in England. In the case of *Pickering v. Appleby*, Com. Rep. 354, the case was directly and fully argued, before the twelve judges, who were equally divided upon it. But in several other cases afterwards determined in Chancery, the better opinion seemed to be, that shares in incorporated companies, were within the statute, as goods or merchandise. *Mussell v. Cooke*, Prec. in Ch. 533; *Crull v. Dodson*, Sel. Cas. in Ch. 41.

We are inclined to the opinion, that the weight of authorities, in modern times, is, that contracts for the sale of stocks and shares in incorporated companies, for more than ten pounds, are not valid, unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheaton, 89, note; 3 Starkie on Evid. 4th Amer. Edit. 608.

Supposing this a new question now for the first time calling for a construction of the statute, the Court are of opinion that as well by its terms, as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise," are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies.

There are many cases indeed in which it has been held in England, that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and thence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal, and coercive, and tended to deprive a man in trade of all his property. But most joint

stock companies were founded on the hypothesis at least, that most of the shareholders took shares as an investment and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question.

The main argument relied upon, by those who contend that shares are not within the statute, is this. That statute provides that such contract shall not be good &c., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication, the statute applies only to goods, of which part may be delivered. This seems however to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods &c. shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature it cannot apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the term goods, as they are within the reason and policy of the act, the Court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action. As to the argument, that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and cannot therefore be relied upon to show a cause of action when the action was commenced.

Verdict set aside and plaintiff nonsuit.

WHITE, EXECUTOR, v. SALISBURY.

1862. 33 *Missouri*, 150.¹

THE appellant sued the respondents upon the following instrument of writing:

"We, the undersigned, agree to pay and deliver to William White, or order, seven hundred and seventy-seven dollars and sixteen and three-fourths cents in railroad stock of the North Missouri Railroad Company, the same to be delivered to him on or before the fifteenth day of July next, which amount is understood to be seven shares and $.77\frac{3}{4}$ of a share. The above shares are given in discharge of a note given by L. W. Salisbury to William White for \$616.72, and dated February 21, 1853. L. W. Salisbury, H. D. Brown. Test: W. G. Shackelford. Dated 22d June, 1857."

Plaintiff averred in his petition that the defendants had failed to comply with their contract, in not delivering the railroad stock on or before the fifteenth day of July, 1857, the time agreed upon for its delivery, and claimed damages to the amount of the consideration advanced by White to Salisbury & Brown, being the note he (White) held on Salisbury for the sum of \$616.72.

The answer of the defendants denied that plaintiff was entitled to damages, as claimed, or in any sum; that defendants did, in compliance with the terms of their contract, on the fifteenth day of July, 1857, have the requisite number of shares entered in the name of William White upon the books of the North Missouri Railroad Company.

This cause was submitted to the court without a jury, and the following declarations of law were prayed by plaintiff:

1. That, under the terms of the contract read in evidence between the plaintiff's testator and defendants, the defendants were bound to deliver on or before the fifteenth day of July, 1857, a certificate of the stock contracted to be delivered, and that a transfer upon the books of the company, on the fifteenth day of July, 1857, or at any previous time, without any notice to White, is not in law a sufficient delivery under said contract.

The Court refused the instructions, and gave a judgment for the defendants.

Jones & Hayden, for appellant.

I. That under the contract a transfer or entry upon the books of the company of the amount of stock contracted to be delivered was no delivery, either *actual* or *symbolical*.

[Remainder of argument omitted.]

Sharp & Broadhead, for respondents.

I. The act of respondent Salisbury, in procuring a transfer of the amount of the stock called for by the contract on the books of the

¹ Part of case omitted. — Ed.

North Missouri Railroad Company, is a substantial compliance with the contract. It may be safely stated, that upon an agreement for the sale of personal chattels, where the property is in its nature intangible and incapable of manual or actual delivery, that if the vendor, by his act, passes the title to the vendee and puts it out of his power to recall it, that it amounts to a delivery. (Acts of 1853, pp. 325 & 326, sec. 8) This was done by act of the company, and the mere fact that the new certificates of stock were handed to defendant did not vest him with any authority or control over them; they were issued to White, and White alone could control the stock or re-assign it. (5 W. & Serg. p. 106.)

[Remainder of argument omitted.]

DRYDEN, J. The defendants, by the contract sued on, agreed to deliver to the plaintiff's testator, on or before the fifteenth of July, 1857, seven 77-100 shares of stock in the North Missouri Railroad Company. The main ground of controversy in the court below was as to what was required to be done by the defendants to comply with their engagement, the plaintiff maintaining that the delivery of certificates of stock to his testator was essential; while it was insisted by the defendants that a transfer of the stock to him on the books of the company was what was necessary, and all that was requisite. We think the defendant's theory the correct one. The end the parties intended to accomplish was to confer upon the plaintiff's testator the title and ownership of the stock contracted for. The delivery of the certificates from one party to the other would leave the title to the stock just where it was before. The only effectual mode of transferring the title was by a transfer on the books of the company, and by that means only.

The eighth section of the amended charter of the North Missouri Railroad Company, (Sess. Acts of 1853, p. 325-6,) provides that, "when payment for the stock of any subscriber or stockholder shall be fully made, the president and directors shall deliver one or more certificates of such stock, signed by the president, and countersigned by the treasurer, under the seal of the company, to such subscriber or stockholder, for the number of shares belonging to him or her, which certificates shall be transferable in a book to be kept for that purpose by the company, and, when transferred, shall be delivered up to the president and directors and be cancelled, and new certificates be issued to the assignee." In the *Agricultural Bank v. Burr*, 11 Shepley (Me.) R. 263, shares of bank stock had been transferred to the defendant on the books of the bank, but no certificate of stock had been issued to him. The question arose whether he was a stockholder. Mr. Justice Shepley, in delivering the opinion of the court, says, "a person becomes legally entitled to shares so transferred to him upon the books of the bank. The certificate is but additional evidence of his titles." Same *Bank v. Wilson et al.* 273, is to the same effect. (*Ellis v. Essex Merrimack Bridge Co.* 2 Pick. 243; *Chester Glass Co. v. Dewey*, 16 Mass. 94.)

[Remainder of opinion omitted.]

Judgment affirmed.

BOATMEN'S INSURANCE AND TRUST CO. v. ABLE.

1871. 48 *Missouri*, 136.¹

ERROR to St. Louis Circuit Court.

Glover & Shepley, for plaintiff in error.

Sharp & Broadhead, for defendants in error.

BLISS, J. Defendants were indebted to the plaintiff by a promissory note for \$4,000 and Able, the principal upon the note, owned stock in the company. Upon maturity of the note, defendant Able proposed to sell the plaintiff his stock in part payment, and to his proposition received the following reply :

“DEAR SIR: I am instructed to receive your eighty shares of Boatmen's Insurance stock at fifteen dollars per share, and credit the amount on your new note for \$4,000 payable at thirty days after date. If the above proposition meets your views, you will please send your note and your stock certificate by your boy, and step in yourself and transfer the same on the books of the company.

Yours respectfully,

EDW. BROOKS, *Sec'y*.

The new note was sent in without the certificate, and a few days after, Mr. Able called and said his stock certificate was mislaid, but that he would look it up, and signed upon the stock-book of plaintiff the usual blank transfer of his stock, to be filled up by plaintiff's officers. Not being able to find his certificate, he again calls and asks that the price of the stock be indorsed upon the note without its production ; but plaintiff's secretary refused to make the indorsement unless Mr. Able would obtain a new certificate and assign it by complying with the terms of one of the company's by-laws. This Mr. Able would not do. The new note went to protest, and this suit is brought to recover its amount. The answer sets up part payment by a transfer of the stock, and the reply denies the transfer. The only question of fact put in issue was whether the stock was actually transferred or not ; and the court, finding the affirmative of that issue, gave judgment for the balance due on the note. Even if we thought that the preponderance of evidence showed that plaintiff's officers took the assignment conditionally, and never intended to receive the stock unless the certificate was given up, and hence that it was not in fact transferred, yet the court below found otherwise, and that finding we cannot review, but can only inquire whether the court was justified in refusing the following declaration of law asked by plaintiff : “ If the court find that plaintiff agreed with defendant Able to take eighty shares of stock, standing on their books in his name, and credit \$1,200 on the debt in suit, without knowing said Able could not produce his certificate for said shares for cancellation, plaintiffs were not bound to enter said credit without such

¹ Arguments omitted. — Ed.

production of said certificate for cancellation ; and if said Able would neither produce said certificate for cancellation nor take steps provided by plaintiff's by-laws to procure another certificate in case of loss, the verdict should be for plaintiffs."

This declaration, if made, would have been defective in ignoring several facts, among which was the actual assignment upon the company's books ; nor does it seem to have been drawn with a careful reference to the issue. The question was transfer or no transfer, purchase or no purchase, and it only touches that question argumentatively. With reference to this issue, the scope and effect of the instruction must be understood to be that there could have been no transfer of the stock without a surrender of the stock certificate, unless such surrender was waived by the purchaser, and that this stock was not in fact transferred for want of compliance with the requirements of the company's by-laws in obtaining a new certificate for surrender. Had the declaration predicated the agreement to purchase upon such surrender, as a condition of receiving the stock, it would have been so far clearly right, for the plaintiff's officers had a right to affix any condition to their agreement they saw fit. (They certainly had a right to insist that the outstanding stock certificate should be given up, and to refuse to receive a transfer until it was done.) But the declaration does not do that ; and if the construction I have given it be the correct one, the plaintiff is made to claim that no credit should be given for the stock, although it may have been legally transferred. We have, then, only to consider whether the transfer could have been in fact made without the production of the certificate, and not whether defendant Able failed to comply with a reasonable condition in an agreement to purchase. Upon this point there can be no doubt. Plaintiffs' charter, approved January 26, 1864 (§ 8), expressly provides that the stock shall "be assignable only on the books of the company," and thus adopts the rule applicable to the transfer of corporation stock, whether expressed in the charter or not, with its corollary that such assignment upon the books passes the title. (White, Ex'r, v. Salisbury, 33 Mo. 150.) It is also a recognized rule in the sale of stock that an assignment or transfer of a stock certificate will not of itself pass the title to the stock, although, like an agreement in writing to sell land, it gives an equity, and the assignee of the certificate can compel a transfer upon the books except as against a *bona fide* purchaser who has acquired a title by such transfer. (Sargent v. Franklin Ins. Co., 8 Pick. 90 ; Sargent v. Essex M. R. C., 9 Pick. 202 ; Com. Bank v. Cartwright, 22 Wend. 348 ; Chouteau, etc., v. Harris, 20 Mo. 382.)

The fear that there might be such outstanding equity that would give trouble to the purchaser, would be a very good reason on his part for insisting, as a condition of purchase, that the certificate be surrendered. But when no such condition was insisted on, and the transfer was in fact made, such fear would be no excuse for refusing payment. The purchaser in that case would assume the risk of all the trouble that

might arise from the outstanding certificate. The court below found this fact against the plaintiff, and, having so found it, committed no error in refusing the declaration of law he sought.

The judgment will be affirmed. ¹⁴⁹⁰~~Judge~~ Wagner concurs. Judge Carrier not sitting.

COMMONWEALTH v. CROMPTON.

1890. 137 Pa. State, 138.¹

IN THE MATTER of the escheat of the estate of Alexander McNaughton, deceased.

Issue between the Commonwealth and Mrs. Susan Crompton, administratrix. McNaughton died intestate, unmarried, without issue; and, so far as known, leaving no kindred. Proceedings for an escheat were instituted in behalf of the Commonwealth. Mrs. Crompton introduced evidence that McNaughton had boarded in her family for many years, that she did his washing and mending, and that he said he would pay her some day; also that, some months before his death, he gave her a box, telling her it would be of some use to her after he died. She took the box, but did not open it until after his death, when it was found to contain a United States bond, and certificates of various shares of railroad stock [standing in the name of McNaughton, and without any transfer signed by him].

The jury were instructed that if McNaughton did give her the property in the box in the manner testified to, or any other manner, the verdict must be for the defendant.

Judgment having been rendered on the verdict, the plaintiff appealed.

Samuel Gormley (*John E. Faunce* and *Frederick Gaston*, with him), for appellant.

J. Henry McIntire and *F. Carroll Brewster*, for appellee.

McCOLLUM, J. [After deciding other points.] A gift needs no consideration to support it, yet in the present case there was a valuable one acknowledged by the donor, and impelling him to the action which is the subject of this controversy. For twenty-one years he lived in the family of the donee as a boarder, and had his washing and mending done there, and for these he promised to pay her. He was in poor health the last four years of his life, and required and received from her and her children considerate care and attention. He often manifested grateful appreciation of these services, and expressed a purpose to make compensation for them. In execution of this purpose, he delivered to her the box containing the government bond and the cer-

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

tificates of railroad stock. It is apparent from the evidence that he intended to make an absolute gift of these securities to her, and that he supposed the delivery, and the words accompanying it, invested her with the exclusive control and ownership of them. There remains for consideration the question whether the failure to make a formal written transfer of the securities to the donee will defeat the purpose of the donor and give them to the commonwealth as an escheat.

It is now settled that a valid gift of non-negotiable securities may be made by delivery of them to the donee without assignment or indorsement in writing. This principle has been applied to notes, bonds, stock and deposit certificates, and life-insurance policies. In *Pennsylvania, Wells v. Tucker*, 3 Binn. 366; *Lacey v. Lacey*, 7 Pa. 251, and *Madeira's App.*, 17 W. N. 202, are illustrations of and rest upon it, and it has distinct recognition and approval in other deliverances of this court. In *Walsh's App.*, 122 Pa. 177, we refused to extend it to a depositor's bank-book, but acknowledged "that, in the case of notes and other instruments payable to order, a delivery accompanied by words importing a present absolute gift would invest the donee with the ownership of the fund." The bank-book was regarded as on the same footing as a book of original entries, and the mere delivery of it to the donee as insufficient to pass any title to the accounts appearing upon it. But "a certificate of deposit is a subsisting chose in action, and represents the fund it describes, as in case of notes, bonds, and other securities, so that delivery of it as a gift constitutes an equitable assignment of the money for which it calls:" *Basket v. Hassel*, 107 U. S. 602. In the case last cited, Mr. Justice MATTHEWS, after an exhaustive examination of the authorities, said: "The point which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee so as to vest him with an equitable title to the fund it represents and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift inter vivos, but upon the recognised conditions subsequent, in case of a gift mortis causa."

The shares of stock are choses in action, and the certificates evidence of the title to them: *Slaymaker v. Bank*, 10 Pa. 373. Why may not a delivery of the certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock, which the donor or a volunteer cannot successfully assail? A stockholder may clothe another with the complete equitable title to his stock without compliance with the forms printed by the corporation: *United States v. Vaughan*, 3 Binn. 394; *Commonwealth v. Watmough*, 6 Wh. 117; *Building Ass'n v. Sendmeyer*, 50 Pa. 67; *Finney's App.*, 59 Pa. 398; *Water-Pipe Co. v. Kitchenman*, 108 Pa. 630.

As the gift in question was supported by a valuable consideration, and the instruments which represented the ownership of the donor in

the subject-matter of the gift were delivered to the donee, we think she has a title to the securities which cannot be destroyed in a proceeding by the commonwealth to escheat them.

Judgment affirmed.

MATTHEWS v. HOAGLAND.

1891. 48 *New Jersey Equity*, 455.¹

ONE question in this case was whether certain shares in the Camden & Amboy R. R. Company were the property of the estate of the late Henry Matthews. It was claimed on behalf of two of his children that he gave these shares to them. Mrs. Hoagland, one of the children, testified in substance, that her father handed the certificate of this stock to her brother, John H. Matthews, in her presence, telling him that this was for his sister and himself, and that he (the father) wanted the brother and sister to have it whilst he was living.

Martin L. Trimmer and *Charles A. Skillman*, for plaintiff.

J. Newton Voorhees and *Albert D. Anderson*, for various defendants.

GREEN V. C.

These shares are on the face of the certificate in the name of Henry Matthews, and declared to be "transferable only by him, or by his legal representatives, on the books of the company, on the surrender of this certificate." The certificate has on its back a printed blank assignment and power of attorney for the transfer of the stock by the record owner.

The provisions of charters, or of by-laws, under the statute (*Rev. p. 181 § 26*), that stock of the corporation shall be transferable only on the books of the company, are held to be intended merely for the protection of the company.

It is settled that one in possession of a certificate of stock in an incorporated company, accompanied by an assignment in blank, executed by the record owner, with an irrevocable power of attorney, authorizing the transfer of the stock, is presumptively the equitable owner of the shares, whose title thereto cannot be impeached if he has given value for them without notice of any intervening equity. *Rogers v. New Jersey Insurance Co.*, 4 *Halst.* 167; *Broadway Bank v. McElrath*, 2 *Beas.* 24; affirmed in *Hunterdon County Bank v. Nassau Bank*, 2 *C. E. Gr.* 496; *Mount Holly Co. v. Ferree*, 2 *C. E. Gr.* 117; *Prall v. Tilt*, 1 *Stew. Eq.* 479; *Del. & Atl. R. R. v. Irick*, 3 *Zab.* 321; *State, Bush, v. Warren F. Co.*, 3 *Vr.* 439.

¹ The greater part of the case is omitted. — Ed.

The reason of the rule is, that the record owner has done everything in his power to effect the transfer, and by such act has assigned all interest he may have had, and surrendered all *indicia* of ownership — as to third parties, holders for value, he is estopped from asserting ownership (*McNeil v. Tenth National Bank*, 46 *N. Y.* 325; *Williams v. Col. Bank*, *L. R.* (38 *Ch. Div.*) 388; *affirmed L. R.* (15 *App. Cas.*) 267 — as to volunteers, the gift is complete and irrevocable if *inter vivos*.

In England, stocks, shares, bonds, debentures and other securities which are not assignable at law unless duly transferred, must be duly transferred, and not merely assigned or covenanted to be transferred, to constitute a valid gift. *May Fraud. Conv.* *413; *Antrobus v. Smith*, 12 *Ves.* 39; *Dillon v. Coppin*, 4 *Myl. & C.* 647; *Searle v. Law*, 15 *Sim.* 95. The Companies Clauses act of 1845 requires such assignments to be by deed, and to be delivered to the officer of the company, without which formalities the legal title will not pass. *Nanney v. Morgan*, *L. R.* (37 *Ch. Div.*) 346. The English cases proceed on the ground that the title not having passed by a legal assignment, equity will not interfere to enforce an equitable title of a volunteer.

The same is the effect of the decisions in Maryland, unless the transfer is made complete in the lifetime of the donor, on the ground that the power of attorney does not survive him (*Pennington, Admr., v. Gitting's Exrs.*, 2 *Gill. & J.* 209; *Balt. Retort and Fire Brick Co. v. Mali*, 65 *Md.* 93), while in other states the mere delivery without endorsement or written assignment of the certificate of stock with words of gift are held sufficient. *Commonwealth v. Crompton (Pa.)*, 20 *Atl. Rep.* 417; *Ridden v. Thrall (N. Y.)*, 26 *N. E. Rep.* 627; *Hopkins v. Manchester (R. I.)*, 19 *Atl. Rep.* 243.

Smith v. Burnet, 8 *Stew. Eq.* 314, in the court of errors and appeals, on the question of gift, turned on the point that there was no such delivery of the stock as implied an intention, on the part of the donor, to give it absolutely, or to abandon control of its proceeds.

The ordinary, in *Dilts v. Stevenson*, 2 *C. E. Gr.* 407 (at p. 413), says: "To constitute a perfect gift the donor must part with the possession and dominion of the property. And if the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed" — citing 2 *Kent Com.* *439. The rule, thus broadly given in the last sentence, has undoubtedly, since Chancellor Kent so stated it in his commentaries, been greatly relaxed in many jurisdictions with reference to money obligations, and in others to all choses in action, while Judge Grover, in *Gray v. Barton*, 55 *N. Y.* (at p. 73), quotes the same extract with approval. In many cases in that state the principle seems to be disregarded. There is great diversity of opinion evinced by the decisions in other jurisdictions, but I am unable to find any authority in this state which would indicate a departure from the principle stated.

The relaxation of the rule elsewhere seems to have resulted from the ruling as to money obligations, and gifts *causa mortis*.

There seems, however, to be every reason why it should be adhered to in a case of an alleged gift *inter vivos* of stock, both from the nature of the subject-matter, and from the incidents of such gifts.

There is a wide difference in the character of property in shares of stock and that in money obligations.

Chief-Justice Shaw, in *Fisher v. Essex Bank*, 5 Gray 373 (at p. 377), speaking of the character of property in shares of stock, and wherein it differs from a money obligation, says: "A nearer analogy, perhaps, is that of a chose in action, capable, like this, of being assigned in equity, by a delivery over of the certificate, which is the assignor's muniment of title, with an assignment duly executed, transferring to the assignee all the assignor's right, title and interest. And yet it is not like the assignment of a chose in action, which is the transfer of the assignor's interest in a debt, and vests in the assignee an equitable right to collect the debt in the name of the assignor.

"The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concern; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital, on winding up and terminating the active existence and operations of the corporation. Again, when a transfer is rightfully made and complete, it vests a right in the transferee not merely to act in the place of the vendor and in his name, but substitutes him, in all respects, as the legal and only holder of the shares transferred to the same extent to which they were before held by the vendor. The title, therefore, by which such interest is held is strictly a legal title; it is created and defined by law; its benefits are secured by law; it is transferable by operation of law, and may be attached on mesne process and seized on execution and sold by legal authority to satisfy the debts of the owner."

The incidents of gifts *inter vivos* call for the observance of the rule as laid down by Chancellor Kent. Cogent reasons are given by Mr. Justice Gilbert in *Johnson v. Spies*, 5 *Ham*, 468, why the law might well overlook an informality or incompleteness in a gift *causa mortis*, which it would not tolerate in respect to a gift *inter vivos*. 15 *Alb. L. J.* 40.

A gift *inter vivos* must be complete *in presenti*; it has no reference to the future; there must be a delivery, and it must be an actual one, "so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject." 2 *Kent Com.* *439.

In *Basket v. Hassell*, 107 *U. S.* 602, Mr. Justice Matthews (at p. 614) says: "The point which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and

to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in cases of a gift *mortis causa*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its terms, will not suffice."

As delivery is necessary to the validity of a gift *inter vivos*, and as the certificate of stock is the only thing connected with its ownership that is capable of manual tradition, it would seem that an assignment and power to transfer, which are necessary to make the certificate at once available, inheres in its effectual delivery.

There appears to be a controlling distinction between a transfer involving the delivery of a certificate of stock with an assignment and power to transfer the shares, with words of gift, and a delivery of the certificate unassigned and unaccompanied by an act or writing empowering its transfer; for a gift *inter vivos* being incomplete so long as any act of the donor remains undone which is necessary to confer on the donee the power of the present control and enjoyment of the subject of the gift, the failure of the record owner of the stock to clothe the donee with the means of at once acquiring the benefits of the stock, leaves unperformed an act which prevents the gift from taking effect *in presenti* which is vital to it as a gift *inter vivos*.

Again, it is necessary to the validity of a gift *inter vivos* that all of the title of the donor, whatever it may be, should be transferred at once to the donee. He cannot retain any interest therein without destroying its character as a gift. *Young v. Young*, 80 N. Y. 422.

The handing over of a certificate of stock without a written assignment or power certainly does not transfer the legal title. If we admit it confers an equitable title, the legal has remained in the donor, and cannot be enforced, for equity recognizes and makes effective only assignments founded on a valuable consideration and does not aid a volunteer. *May Fraud. Conv.* *406; *Weale v. Ollive*, 17 Beav. 252.

Nor under the decisions will equity build up a trust with the fragments of an incomplete gift. *Antrobus v. Smith*, 12 Ves. 39; *Richards v. Dolbridge*, L. R. (18 Eq. Cas.) 11; *Moore v. Moore*, L. R. (18 Eq. Cas.) 474; *Milroy v. Lord*, 4 De G., F. & J. 274; *Hertley v. Nicholson*, L. R. (19 Eq. Cas.) 233; *Young v. Young*, *supra*.

In my judgment the character of the property in shares of a corporation, as well as the distinctive qualities of a gift *inter vivos*, forbid a departure from the rule, that a valid gift of such property cannot be made by the delivery of the certificate of stock, without formal transfer, or an assignment and power in writing to transfer the shares.

But, independent of the legal question, the rule that the possession of the certificate assigned or accompanied by authority to transfer is evidence of ownership, is now the recognized law of all mercantile communities in this country, and under it all transactions in the sale or pledge of stocks are carried on. The usage is so universal that the trans-

fers are printed on the certificates, as on the one in question. If the decisions in this state did not seem to require an assignment in writing, I would be satisfied that the failure of Henry Matthews to execute the transfer and power of attorney on the back of the certificate, was conclusive evidence that he did not intend to make a present gift of the stock, and to divest himself of all control and dominion over it or its proceeds. There was no haste in the matter; he had taken the time to execute the deed to John Matthews with all formality; he, it must be assumed, knew that the company would require his assignment in writing to transfer the stock, and notwithstanding anything he may have said indicating an intention to give it, the fact of his not making the paper effective shows that he intended to retain some dominion over the property. If so, it is fatal to the transaction as a gift *inter vivos*. The stock of the Camden and Amboy railroad I am of opinion was not effectually given by the intestate, and belonged at his death to his estate.

EAST BIRMINGHAM LAND CO. v. DENNIS.

1888. 85 *Alabama*, 565.¹

APPEAL from the City Court of Birmingham, in equity.

Heard before the Hon. H. A. SHARPE.

The bill in this case was filed on the 13th April, 1888, by J. F. Dennis, against J. P. Mudd, and the East Birmingham Land Company, a private corporation; and sought to compel the transfer, on the books of the corporation, of a certificate for ten shares of stock, of which the complainant claimed to be the owner, and to compel the delivery of the certificate to him by said Mudd, who had possession of it under claim of ownership. The certificate was issued in the name of A. R. Dearborn, and was indorsed by him in blank. The complainant claimed that he had bought the certificate, with the blank indorsement thereon, from a holder who had acquired it by purchase from said Dearborn; and that it was lost by him, or stolen from him, without fault on his part. Mudd purchased the certificate, for full value, from Wilson, Sage & Clark, stock-brokers in Birmingham; and while denying complainant's ownership, claimed that he acquired a good title by the custom and usage of brokers and merchants in Birmingham. A decree *pro confesso* was taken against the corporation. On final hearing, on pleadings and proof, the court rendered a decree for the complainant; and this decree is now assigned as error, by each of the defendants separately.

S. D. Weakley, for appellants.

W. R. Houghton, contra.

¹ Citations of counsel omitted. — Ed.

SOMERVILLE, J. We concur in the conclusion reached by the judge of the City Court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession, without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it, some time in March, 1888.

The only question is, whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent, or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value, of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It can not be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence, or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking-house, whence it was abstracted by some unknown person, apparently, without any fault on his part.

Nor does any question arise involving the rights of a subsequent *bona fide* purchase of stock, from one shown to be owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors, or purchasers without notice."—Code 1886 § 1671; *Fisher v. Jones*, 82 Ala. 117. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant Dennis himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper.

The rule is well settled, that a *bona fide* purchaser of a negotiable bill, bond or note, although he buys from a thief, acquires a good title, if he pays value for it without notice of the infirmity of his vendor's title. The authorities are clear in support of the view, that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the

absence of all negligence on the part of the owner, or his authority to make the sale. This question arose, and was decided by the New York Court of Appeals, in *Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 N. Y. (1856), 599. It was there held, that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. (They declare simply that the person named is entitled to certain shares of stock.) They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be, in some respects, like a bill of lading, or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is, that all such instruments possess a sort of *quasi* negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In *Shaw v. Spencer*, 100 Mass. 382; s. c., 97 Amer. Dec., 1 Amer. Rep. 115 (1868), it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name, must fill out the blanks, . . . so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of *Sevall v. Boston Water Power Co.*, 4 Allen, 282; s. c., 81 Amer. Dec. 701, decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in *Barstow v. Savage Mining Co.*, 64 Cal. 388; s. c., 49 Amer. Rep. 705, where it was expressly held that a *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact, that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in regard to the matter of negligence, as follows: "But, if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading, in *Gurney v. Behrend*, 3 Ellis & Bl. 622, decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The

correspondent, without authority, fraudulently transferred the bill for value; and it was held by Lord Campbell, that for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of *Barstow v. Savage Mining Co.*, *supra*, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. — *Woolley v. Sargeant*, 14 Amer. Dec., NOTE, on page 427, and cases there cited; Cook on Stock and Stockholders, sec. 368, 437, 192, 7, 10; 2 Daniel's Neg. Instr. (3d Ed.), § 1708*g*. It harmonizes entirely with the declaration of our statute, that shares of stock in private corporations "are personal property, transferrable on the books of the corporation" in accordance with the rules and regulation of the corporation. — Code 1886, § 1669; *Campbell v. Woodstock Iron Co.*, 83 Ala. 451.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee, to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases, it has often been held that the true owner, having conferred on the holder, by contract, all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." — 2 Dan. Neg. Inst. (3d Ed.), § 1708*g*; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Mount Holly Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 *Ib.*, 479; *Merchant's Nat. Bank v. Livingston*, 74 N. Y. 223. These cases rest on the principle, that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver, than a stranger who has been negligent in trusting no one." — *Allen v. Maury & Co.*, 66 Ala. 10.

It being an established principle of law, that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock-brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. *Dickinson v. Gay*, 83 Amer. Dec. 656, and note, 664; *E. T., Va. & Ga. R. R. Co. v. Johnston*, 75 Ala. 576; *Lehman v. Marshall*, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed.

MCNEIL v. TENTH NATIONAL BANK.

1871. 46 *New York*, 325.¹

APPEAL from a judgment of the General Term in the fourth district, affirming a judgment entered in Montgomery county, in favor of the plaintiff on the report of a referee.

The action was brought, to compel the surrender to the plaintiff of 134 shares of the capital stock of the First National Bank of St. Johnsville, which had been acquired by the appellant in the following manner:

In November, 1866, the plaintiff then being the owner of the shares in question, had an account with Goodyear Brothers & Durant, of the city of New York, stock brokers, relating to other stocks, which they had purchased and were carrying for him. For the purpose of securing any balance which might become due them on that account, the plaintiff delivered to and left with them, the certificate of the 134 shares in dispute, with a blank assignment, and power of attorney to transfer indorsed thereon, signed by the plaintiff, in the following words:

For value received, the undersigned hereby assigns and transfers unto . . . shares of the capital stock of the First National Bank of St. Johnsville, and do hereby constitute and appoint . . . true and lawful attorney, irrevocable for . . . and in . . . name and behalf, to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank.

In witness whereof, I have hereunto set my hand and seal, this — day of —.

(Signed.)

B. MCNEIL.

Sealed and sworn in presence of —.

On the 18th of June, 1868, at the city of New York, the appellant at the request of Goodyear Brothers & Durant, paid the sum of \$45,135 to Fred. Butterfield, Jacobs & Co., receiving from them certain securities, including the certificate and power for the 134 shares in question, which had been previously pledged by Goodyear Brothers & Durant to Fred. Butterfield, Jacobs & Co.

Goodyear Brothers & Co. were at that time insolvent, and indebted to the appellant. In pledging the plaintiff's shares, they had acted without actual authority from him, and without his knowledge. He was indebted to them, on the account for which the shares were pledged to them, in the sum of \$3,000 with interest from December 1, 1866; but the account had not been rendered, or any demand made.

The appellant, at the time of receiving the shares, had no knowledge of the plaintiff's interest therein.

¹ Arguments and part of opinion omitted. — Ed.

The cashier of the appellant, within a few days after receiving the certificate, assignment and power, filled in the blank in the assignment and power with "I. H. Stout, cashier, Tenth National Bank, New York, one hundred and thirty-four," and dated the same the 19th day of June, 1868, and sent the scrip to the First National Bank of St. Johnsville, for the purpose of having the shares transferred on the books accordingly; but such transfer was prevented by an order of injunction in this action.

The plaintiff demanded of the appellant a surrender of the scrip, on payment of the balance due by him to Goodyear Brothers & Durant; which demand was refused.

The value of the shares was \$17,420. The balance of the advance made by the appellant thereon (\$45,135, less the proceeds of the other securities received therewith, \$29,915.19), was \$15,219.81, besides interest.

When the certificate and power came to the possession of the appellant, they bore the proper revenue stamp, duly cancelled with the stamp of Goodyear Brothers & Durant, and the name of Ch. Goodyear as subscribing witness to the power. The referee found, that when the plaintiff delivered them, they were not stamped or witnessed, and that the plaintiff had never authorized those acts.

The referee found in favor of the plaintiff, and in conformity with his report, a judgment was entered, requiring a surrender of the scrip to the plaintiff, on payment by him of the \$3,000 and interest due by him to Goodyear Brothers & Durant.

This judgment was affirmed at General Term, and an appeal taken to the late Court of Appeals, where, after argument, that court was divided and a re-argument ordered. The case now comes up on the re-argument.

E. L. Fancher, for appellant.

S. Hand, for respondent.

RAPALLO, J. The pledge of the plaintiff's shares by his brokers, for a larger sum than the amount of their lien thereon, was a clear violation of their duty, and excess of their actual power. And if the effect of the transaction was merely to transfer to the appellant, through Fred. Butterfield, Jacobs & Co., the title or interest of Goodyear Brothers & Durant in the shares, the judgment appealed from was right.

It must be conceded, that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend

upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance. (*Pickering v. Busk*, 15 East, 38; *Gregg v. Wells*, 10 Adol. & El., 90; *Saltus v. Everett*, 20 Wend., 268, 284; *Mowrey v. Walsh*, 8 Cow., 238; *Root v. French*, 13 Wend. 570.)

The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers.

Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. (*Ballard v. Burgett*, 40 N. Y. R. 314.) "The mere possession of chattels, by whatever means acquired, *if there be no other evidence of property or authority to sell from the true owner*, will not enable the possessor to give a good title." Per DENIO, J. in *Corill v. Hill* (4 Den., 323).

But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised, are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle, from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power.

In the present case, the plaintiff delivered to and left with his brokers, the certificate of the shares, having indorsed thereon the form of an assignment, expressed to be made "for value received," and an irrevocable power to make all necessary transfers. The name of the transferee and attorney, and the date, were left blank. This document was signed by the plaintiff, and its effect must be now considered.

It is said in some English cases, that blank assignments of shares in corporations are irregular and invalid; but that opinion is expressed in cases where the shares could only be transferred by deed under seal, duly attested, and is placed upon the ground that a deed cannot be executed in blank.

Without referring to the American doctrine on that subject, it is sufficient to say that no such formality was requisite in this case. It was

only necessary to a valid transfer as between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignments and power, has been repeatedly shown and sanctioned in cases which have come before our courts. Such was established to be the common practice in the city of New York, in the case of the *New York and New Haven Railroad Company v. Schuyler* (34 N. Y., 41), and the rights of parties claiming under such instruments were fully recognized in that case. And in the case of *Kortright v. The Commercial Bank of Buffalo* (20 Wend., 91, and 22 Wend., 348), the same usage was established as existing in New York and other States, and it was expressly held that even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and that a party to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature.

It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. (Angell and Ames on Corporations, 8th ed., § 354; *Bank of Utica v. Smalley*, 2 Cow., 770; *Gilbert v. Manchester Co.*, 11 Wend., 627; *Kortright v. Com. Bank of Buffalo*, 22 Wend., 362; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 N. Y., 80.)

In the case of *Kortright v. Com. Bank*, Chancellor WALWORTH, in a dissenting opinion, strenuously maintained, in conformity with his previous decision in *Stebbins v. Phoenix Ins. Co.* (3 Paige, 356), that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares; and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained. (22 Wend., 352, 353, 355.) But his view was overruled by the majority of the court. The action was at law in assumption, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, the legal title to the shares will pass by delivery of the certificate and power. (See 20 Wend., 362.)

This was reasserted in this court in the *New Haven Railroad Case* (34 N. Y., 80), notwithstanding what was said in the *Mechanics' Bank Case* (13 id., 625).

By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a *bona fide* purchaser (34 N. Y., 80); but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights. (Id.) He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

The holder of such a certificate and power, possesses all the external *indicia* of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner.

Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy toward persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that, by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact "substituted his trust in the honesty of his brokers, for the control which the law gave him over his own property," and that the consequences of a betrayal of that trust, should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?

These principles, in substance, were applied in the case of *Kortright v. The Commercial Bank*. But it is sought to distinguish that case from this; and it is argued, that there the certificate was intrusted to an agent, with authority from his principal to borrow money upon it for the benefit of his principal, and that he simply exceeded his authority by borrowing more than he was authorized to borrow, and absconding with the excess.

[After commenting on *Kortright v. Bank*.]

The principles of agency are, however, applicable to this case. In disposing of a pledge, the pledgee acts under a power from the pledgor.

The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded. (Story on Bailments, 7th ed., § 311, note 2; *Wasson v. Smith*, 2 B. & Ald., 439.) The pledgee in selling, is bound to protect the interests of the pledgor, and as to the surplus, represents the pledgor exclusively. Now, for what purpose was the apparent ownership and power of disposition of this stock vested in the brokers? Surely for the purpose of enabling them, effectually and summarily, to execute this power under certain conditions. If the power was absolute on its face, or if the whole legal title was by the instrument apparently vested in the pledgee, and the condition was secret, wherein does the case differ in principle from one of ordinary agency.

I am at a loss to conceive on what principle it can be claimed, that an apparent naked authority is more effectual to bind the party giving it, than an apparent ownership as well as authority.

I have reviewed the authorities at much more length than usual, by reason of the difference of opinion expressed in the late Court of Appeals in this case, and for the purpose of meeting the positions so ably maintained in the opinions, in favor of the respondent, delivered in the court below, and in the late court, on the former hearing.

My conclusion is, that the Tenth National Bank must, on the facts found, be deemed to have advanced *bona fide* on the credit of the shares, and of the assignment and power executed by the plaintiff, and is entitled to hold the stock for the full amount so advanced, and remaining unpaid after exhausting the other securities received for the same advance.

The points relative to the stamp and subscribing witness were fully answered in the opinions delivered on the first argument, and do not appear to have been the subject of dissent. I do not deem it necessary again to discuss them here.

The judgment of the General Term, and that entered on the report of the referee, should be modified, so as to allow the plaintiff to redeem, on payment of the balance due to the Tenth National Bank, on its advance of June 19th, 1868, and the costs of the action.

All concur except ALLEN and FOLGER, JJ., not voting.

Judgment modified.

TELEGRAPH CO. v. DAVENPORT.

1878. 97 U. S. 369.

APPEALS from the Circuit Court of the United States for the Southern District of Ohio.

These are suits in equity to compel the defendant, a corporation created under the laws of New York, to replace, in the name of the complainants, certain shares of its capital stock alleged to have belonged to them, and to have been transferred without their authority on its books to other parties; and to issue to them proper certificates for the same; and also to pay to them the dividends received on the shares since such unauthorized transfer. In case the company fail to replace the stock, the complainants ask for alternative judgments for the value of their respective shares.

The facts upon which the suits rest are these: In March, 1865, Charles Davenport, a citizen of Ohio, died, leaving a widow and two minor children, the complainants here, his heirs. He was possessed at the time, besides other property, of eleven hundred and seventy shares of the capital stock of the Western Union Telegraph Company, which, upon the settlement of his estate, were distributed equally between the widow and children, in whose names, respectively, they were entered on the books of the company, and to whom separate certificates were issued. She was appointed guardian of the children. To her, as such, the certificates were delivered, declaring on their face that only upon their surrender and cancellation they were transferable in person or by attorney on the books of the company. On the back of each one was printed a blank form of transfer and power of attorney. She put those belonging to the children, with the one issued to her, and some government bonds, in a tin box, which was locked and deposited in the Fourth National Bank of Cincinnati for safe keeping. Her brother, Robert W. Richey, at that time and for some years afterwards an officer in the bank, had access to the box. He kept the key to it during her absence from Cincinnati, in order to get for collection the coupons attached to the bonds when they became due.

In February, 1871, he took from this box the certificate of three hundred and ninety shares belonging to the complainant, Henry Davenport, and forged his name to the transfer and power of attorney on its back, adding his own signature as that of an attesting witness. In this form he sold the certificate; and the purchasers, using the forged power of attorney, obtained a transfer of the shares on the books of the company. Subsequently, Mrs. Davenport was in Cincinnati, and on one occasion sent for the box, but returned it to the bank without opening it or examining its contents, and being about to depart for Europe, she left the key with her brother. Soon afterwards, he took from the box

the certificate of shares belonging to the other complainant, Katharine Davenport, and forged her name to a like transfer and power of attorney, adding, as in the former case, his own signature as that of an attesting witness. In this form her certificate was also sold, and by the purchaser a transfer was obtained under the forged power of attorney on the books of the company. When these forgeries were committed, both children were minors, Henry being seventeen, and Katharine fifteen years of age. Henry was at the time at school in Switzerland, and in the summer of 1871 Mrs. Davenport and Katharine went to Europe. None of them were informed of the pretended transfers of the stock until the spring of 1873, and in 1874 these suits were brought. They were originally commenced in one of the courts of the State of Ohio, and were removed to the Circuit Court of the United States upon application of the defendant. That court rendered a decree for each complainant, and the company appealed to this court.

The cause was argued by *Mr. Grosvenor Porter Lowrey* and *Mr. J. Hubley Ashton* for the appellant, and by *Mr. John F. Follett* for the appellees.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

Upon the facts stated there ought to be no question as to the right of the plaintiffs to have their shares replaced on the books of the company and proper certificates issued to them, and to recover the dividends accrued on the shares after the unauthorized transfer; or to have alternative judgments for the value of the shares and the dividends. Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society,

and the insecurity which would follow any departure from it would cause far greater injury than any which can fall, in cases of unlawful appropriation of property, upon those who have been misled and defrauded.

We do not understand that the counsel of the appellant controvert these views, but they contend that the mother of the plaintiffs, as their guardian, was chargeable with culpable negligence in the keeping of the certificates, and, therefore, that the plaintiffs are estopped from claiming them or their value from the company. The negligence alleged consisted in the fact that she intrusted her brother with the key to the box in which they were deposited when she knew that he was insolvent, and that he had used, without her authority, funds received by him on a previous sale of a portion of her property; and the further fact, that when, in the summer of 1871, before leaving for Europe, she sent for the box, she returned it to the bank without examining its contents. To have allowed her brother, when known to be insolvent, to have access to the box after he had, without her authority, appropriated to his own use her funds, and to have returned the box to the bank in 1871 without examining its contents, were, according to the contention of counsel, offences of such gravity as to estop her wards, the minor children, from complaining of the company for allowing their stock to be transferred on its books under a power of attorney which he had forged. We do not think it at all necessary to comment at any length upon this singular position; for even if it were possible, as it is not, to preclude the minor heirs from asserting their rights to property received from their father, by reason of any negligence of their guardian, we are unable to perceive any necessary connection between her brother's insolvency and misappropriation of her funds, and the forgery of the children's names, or between such forgery and her omission to open her box in 1871 and examine its contents. There is no circumstance here upon which an estoppel against the plaintiffs can be raised. To create an estoppel against them, there must have been some act or declaration indicating an authorization of the use of their names, by which the company was misled, or a subsequent approval of their use by acceptance of the moneys received with knowledge of the transfer. No act or declaration is mentioned, either of the guardian or her children, which tends in the slightest degree to show that any assent was given to the use of their names. But moreover, neither the guardian nor the children whilst they were minors, were competent, even by the most formal act, to authorize a transfer and sale of the property. Under the statute of Ohio, the intervention of the Probate Court was essential to any such proceeding. No inference could, therefore, be drawn from any negligence of theirs in support of a transfer of the property, where no order of that court authorizing a transfer had been made.

There are numerous decisions of the English and American courts in accordance with the views stated. They are cited by counsel in their

briefs, and are given in a note to this opinion.¹ We do not think it important to refer to them specially, for no number of adjudications can add to the force of a simple statement of the facts. The decree of the court below in each case must be affirmed; and it is

So ordered.

IN RE BAHIA AND SAN FRANCISCO R. CO.

1868. *Law Reports, 3 Queen's Bench, 584.*

On the 11th of May, 1867, it was ordered by rule of court, under 25 & 26 Vict. c. 89, s. 35,² that the name of Amelia Trittin be re-

¹ *Davis v. Bank of England*, 2 Bing. 393; *Hilgard v. South Sea Co. et al.*, 2 P. Wms. 76; *Stoman v. Bank of England*, 14 Sim. 475; *Taylor v. Midland Railway Co.*, 28 Beav. 287; *Ashby v. Blackwell*, 2 Eden, 299; *Lowry v. Commercial & Farmers' Bank of Baltimore*, Taney, C. C. Dec. 310; *Sewall v. Boston Water-Power Co.*, 4 Allen, 277; *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Chew v. Bank of Baltimore*, 14 Md. 299; *Pollock v. The National Bank*, 7 N. Y. 274; *Weaver v. Barden*, 49 id. 286; *Cohen v. Gwynn*, 4 Md. Ch. Dec. 357; *Dalton v. Midland Railway Co.*, 22 Eng. L. & Eq. 452; *Swan v. North British Australian Co.*, 7 Hurl. & Nor 603.

² The 25 & 26 Vict. c. 89 applies (s. 176) with certain exceptions to companies formed and registered under the Joint Stock Companies Acts of 1856 and 1857.

Section 25:—Every company under this act shall cause to be kept in one or more books a register of its members; and there shall be entered therein the following particulars: (1) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and of the amount paid or agreed to be considered as paid on the shares of each member. (2) The date at which the name of any person was entered in the register as a member. (3) The date at which any person ceased to be a member. And any company acting in contravention of this section, shall incur a penalty not exceeding 5*l.* for every day during which its default in not complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention, shall incur the like penalty."

Section 31:— "A certificate, under the common seal of the company, specifying any share or shares, or stock held by any member of a company, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified.

By s. 32, the register is to be open to the inspection of a member gratis, and of a stranger on payment of 1*s.*

Section 35:—"If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may as respects companies registered in England or Ireland, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the court of session, or in such other manner as the said courts may direct, apply for an order of the court that

stored to the register of the Bahia and San Francisco Railway Company in respect of the five shares in the company numbered 84,511 to 84,515 both inclusive, and that the company do pay to Amelia Trittin any dividends that have fallen due since the shares were transferred from her name. And it was further ordered that a special case be stated for the opinion of this Court between the Reverend Richard Burton and Mary Anne Goodburn and the company, for the purpose of determining the amount of damages (if any) which the company are liable to pay them respectively.

1. On the 8th of March, 1866, Miss Amelia Trittin was the registered holder of five shares in the Bahia and San Francisco Railway Company, Limited, hereafter called "the company," and deposited the certificates of the shares with one Thomas Charles Oldham, a stock-broker, and requested him to keep the same and to receive the dividends payable thereon.

2. On or about the 17th of April, 1866, a transfer of the five shares to John Alfred Stocken and Samuel Goldner, purporting to be executed by Amelia Trittin, but which for the purpose of this case is admitted to have been a forgery, was left with the secretary of the company for registration, together with the certificates of the shares.

3. The secretary of the company, in the ordinary course of business, then sent by post to the last place of residence of Miss Trittin a written notice that the deed of transfer had been so received by him, and after ten days having received no answer from her, registered the deed of transfer and removed the name of Miss Trittin from and placed the names of John Alfred Stocken and Samuel Goldner upon the register of shareholders as holders of the aforesaid five shares, and share certificates in respect of the said shares were handed to them.

4. In May, 1866, the Reverend Richard Burton through his broker bought on the Stock Exchange four shares in the company, and Mrs. Mary Anne Goodburn by her broker bought one share.

5. About the same time, John Alfred Stocken and Samuel Goldner sold five shares in the company to Arthur Bristowe, a stockbroker, and in pursuance of the above contracts transferred four of the shares com-

the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal in the manner directed by 'the Common Law Procedure Act, 1854,' shall lie."

Section 37:—"The register of members shall be *prima facie* evidence of any matters by this act directed or authorized to be inserted therein."

prised in the forged transfer to Mr. Burton, and the remaining one to Mrs. Goodburn.

6. It is admitted that Mr. Burton and Mrs. Goodburn entered into the contracts above-mentioned *bonâ fide* and for value of the shares, without notice of any fraud, and according to the usual course of business with reference to the purchase of shares, and on or shortly after the 28th of May, 1866, they were duly registered by the company as the holders of the shares, and share certificates in respect thereof were handed to them.

6a. In the above transactions everything was done by the company in accordance with the usual custom of business, and there was nothing in the circumstances so far as they were known to the company to excite their suspicion or to induce them to depart from such usual course of business.

7. The form of certificate used by the company was:—

Certificate of Shares.

Bahia and San Francisco Railway Company, Limited.

Registered under the Joint Stock Companies Act of 1856.

28th January, 1858.

Nos. to . Five shares of 20*l.* each.

This is to certify that is the registered holder of the shares Nos. to in the above company, subject to the articles of association, on each of which there has been paid to this day three pounds.

Given under the common seal of the company,

Signed by two directors. the day of 18

8. The articles of association were made part of the case. By art. 1, the regulations of table B. of the Joint Stock Companies Act, 1856, were excluded, except as expressly set forth in the articles themselves. By art. 25, the board shall determine the mode and conditions of, and the charges for the transfer of shares, but no such charge shall exceed 2*s.* 6*d.* for every transferor named in the instrument of transfer. By art. 26, every original shareholder shall, on payment of such sum, not exceeding 2*s.* 6*d.*, as the directors prescribe, be entitled to a certificate under the common seal of the company, and under the hands of two of the directors, specifying the shares held by him, and the amount paid up in respect thereof.

The questions for the opinion of the Court were: 1. Whether, as against the company, Mr. Burton and Mrs. Goodburn are entitled to the said shares in the company, or an equivalent number. 2. Whether they are entitled to any and what damages to be paid to them by the company under the above circumstances.

The Court were to make such order and give such judgment as they might think fit, and have power to make and give.

J. Brown, Q. C. (*W. G. Harrison* with him), for the claimants, Burton and Goodburn.

[Argument omitted.]

Watkin Williams (*Cohen* with him), for the company. The contract which a buyer makes in the market is only for a certain number of shares, not any specific shares, and it is not till the purchase is complete that the company is called upon to act and register the transfer. There is, therefore, no contract on which the company can be held liable to the claimants. Nor is there any breach of duty shown on the part of the company; the secretary acted with due caution by notifying the proposed transfer to Miss Trittin, the person purporting to transfer, and the case states (par. 6a) that everything was done by the company in the usual course of business.

[BLACKBURN, J. — The company are bound by the statute to keep a correct register.]

Only to use due diligence in keeping it correct, not to have a register absolutely correct: see *East Gloucestershire Railway Company v. Bartholomew*, Law Rep. 3 Ex. 15.

[BLACKBURN, J. — That case does not touch the present case.

COCKBURN, C. J. — As far as the register is concerned, it does not appear that the claimants ever referred to the register.]

Then it is said that the company, having issued share certificates to Stocken and Goldner, as their credentials of membership, are estopped from denying their title. But the company never asserted they had title, but only that they were on the register as shareholders, which is true. The certificate is no representation to third persons, it is only a document between the holder and the company.

[BLACKBURN, J. — The statute (s. 31) makes the certificate expressly *prima facie* evidence of the title of the holder.]

As between him and the company.

[BLACKBURN, J. — No, *prima facie* evidence generally.]

In all the cases bearing on the subject, the company sought to be made liable had been guilty of negligence; as in *Ashby v. Blackwell*, 2 Eden 299, where the power of attorney was grossly irregular on the face of it. *Hidyard v. South Sea Company and Keate*, 2 P. Wms. 76, is the only case really in point. There, on a transfer of stock under a forged letter of attorney, the dividends and stock were ordered to be refunded and restored by the *assignee* to the right owner, and the company were held not responsible.

[BLACKBURN, J. — That was a case between the company, the purchaser under a forged letter of attorney, and the true owner; the rights of sub-purchasers had not to be considered.]

But surely the remedy is against the vendor, if the purchaser gets nothing, instead of what he contracted for. The company were not in fault; the claimants were not misled by the company, they made no inquiries, nor ever saw the register, as the Lord Chief Justice has pointed out.

[COCKBURN, C. J. — No; but by giving the certificate the company practically armed the vendors with the means of holding themselves out as the holders of these shares.

LUSH, J. — The question comes round to this, what does the certificate mean: does it certify only that A. B. is on the register, or does it not rather amount to certifying that he is in reality a shareholder?]

Only that he is on the register.

[BLACKBURN, J. — Can that be said in the face of s. 31?

LUSH, J. — Suppose after the contract, but before he pays the purchase-money, the purchaser applies to the company to know if his vendor is a member of the company, and the answer is yes? The company would then have made a representation on which they intended the purchaser to act. How does that differ from issuing a certificate, which says the same thing?]

It differs in this: the company do not make a voluntary statement, they are bound to keep a register, and issue a certificate.

[BLACKBURN, J. — They are not bound to put a person on the register who is not rightfully entitled.]

But in order to make them liable for putting a person not entitled on the register negligence must be shown, which is, in effect, negatived in this case. In *Swan v. North British Australasian Company*, 2 H. & C. 175, 181, 188, 32 L. J. Ex. 276, 279, Cockburn, C. J., says, "To bring a case within the principle established by the decisions in *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), and *Freeman v. Cooke*, 2 Ex. 654, 18 L. J. Ex. 114, it is, in my opinion, essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered." And in the same case, Blackburn, J., says, "I agree that a party may be precluded from denying against another the existence of a particular state of things, but then, I think, it must be by conduct on the part of that party such as to come within the limit so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Freeman v. Cooke*, 2 Ex. 663, 659, 18 L. J. Ex. 119, 117. It is pointed out by Parke, B., in the course of the argument in that case, that in the majority of cases in which an estoppel exists, 'the party must have induced the other so to alter his position that the former would be responsible to him in an action for it.' And he had before pointed out that 'negligence,' to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty of it.' And this, I apprehend, is a true and sound principle."

COCKBURN, C. J. — I am of opinion that our judgment must be for the claimants. If the facts are rightly understood, the case falls within the principle of *Pickard v. Sears* and *Freeman v. Cooke*. The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market,

and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. It is stated in this case that the claimants acted bonâ fide, and did all that is required of purchasers of shares; they paid the value of the shares in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferors had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. That brings the case within the principle of the decision in *Pickard v. Sears*, 6 Ad. & E. 469 (E. C. L. R. vol. 33), as explained by the case of *Freeman v. Cooke*, 2 Ex. 654, 18 L. J. Ex. 114, that, if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

The only remaining question is, what is the redress to which the claimants are entitled. In whatever form of action they might shape their claim, and there can be no doubt that an action is maintainable, the measure of damages would be the same. They are entitled to be placed in the same position as if the shares, which they purchased owing to the company's representation, had in fact been good shares, and had been transferred to them, and the company had refused to put them on the register, and the measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares.

BLACKBURN, J. — I am of the same opinion. When joint stock companies were established, the great object was that the shares should be capable of being easily transferred; and the legislature has made provision by 25 & 26 Vict. c. 89, s. 25, that the company shall keep a register of the members, and when the capital is divided into shares, each share is to be distinguished by a number, and the shares held by each member is to be specified, and the dates at which each person's name was entered on the register. In order to keep up such a register, the company must alter its register whenever a transfer of shares is made, on the application and payment of a certain sum to them by the person to whom the shares are alleged to be transferred. And the first thing the company would have to do when a transfer was tendered to them, would be to inquire into its validity; but a company may be deceived, and induced, as the company were in the present case, without any negligence, to receive as genuine a forged transfer. They accordingly

made an alteration in the register, and made it in fact inaccurate by putting the names of Stocken and Goldner on the register as the holders of particular shares, when in fact they were not so. The statute (s. 31) further provides that the company may give certificates, specifying the shares held by any member; and the object of this provision is expressly stated to be that this certificate should be *prima facie* evidence of the title of the person named to the shares specified; and the company, therefore, by granting the certificate, do make a statement that they have transferred the shares specified to the person to whom it is given, and that he is the holder of the shares. If they have been deceived and the statement is not perfectly true, they may not be guilty of negligence, but the company and no one else, have power to inquire into the matter; and it was the intention of the legislature that these certificates should be documents on which buyers might safely act. Now, on the facts of this case, although according to the practice on the stock exchange, the claimants did not originally contract for these particular shares, the money was paid by them or their broker on the execution by Stocken and Goldner of a transfer, and on the certificate under the seal of the company being handed over to them that Stocken and Goldner were the holders of these particular shares; and it is quite clear that a statement of a fact was made by the company, on which the company, at the very least, knew that persons wanting to purchase shares might act. And the claimants having *bonâ fide* acted upon that statement, and suffered damage, can they recover from the company? I think they can, on the principle enunciated in *Freeman v. Cooke*, 2 Ex. 654, 18 L. J. Ex. 114. Suppose an action by the claimants against the company, asserting that the shares were the plaintiffs' and that the company refused to pay them the dividends and deprived them of the use of the shares, in effect an action of trover. The only plea would be that the plaintiffs were not the true owners of the shares, and there would be a replication by way of estoppel, that the company were estopped from saying that the plaintiffs were not the owners, because they had purchased on a statement of title made by the company, and intended by them to be acted upon; this would clearly amount to an estoppel within the rule defined in *Freeman v. Cooke*, 2 Ex. 654, 18 L. J. Ex. 114. The claimants, therefore, would be entitled to a verdict, and it follows that they are entitled as damages to the value of the shares at the time they were converted; that is, at the time when Miss Trittin interfered and claimed the shares.

MELLOR, J. — I am of the same opinion. I think the right of action cannot be grounded on negligence; but that the facts do amount to an estoppel on the company from denying the claimants' title. The company need not register a person as a member, under a transfer of shares of which they have any doubt; but can leave the transferee to come to the Court and make out his title. In the present case the company acted apparently without negligence, on the production of the transfer by the broker, and having sent a letter to Miss Trittin and received no

answer, they caused the transferees to be registered, and gave them a certificate under seal, clearly intending them to use it in the market as a voucher or statement that they were the holders of the particular shares. The claimants accordingly purchase the shares, but it turns out that they acquired no title, and their names are struck off the register. I cannot but think that a person must have a remedy against a company for wrongfully striking his name off the register, so as to prevent his having the advantage of the shares he had purchased, and in such an action by the claimants the estoppel would arise against the company. The measure of damages would be the value of the shares at the time they ceased to be recognized as shareholders. Whether or not the company may have a remedy over against Stocken and Goldner it is unnecessary to consider.

LUSH, J. — I am also of the same opinion. It is not stated what the usual course of business is, but only that the shares were purchased in the usual course. I take it, the claimants having bargained in the share market for a certain number of shares each, they were offered a transfer of the shares which had been transferred by a forged transfer to Stocken and Goldner, the certificate at the same time being handed to them before the completion of the purchase, and by this certificate, in the usual form and under the seal of the company, it is certified that Stocken and Goldner are the registered holders of the specific shares, giving the numbers. Now there is no doubt that the certificate was given by the company to Stocken and Goldner in order that they might use it in the usual way in which such certificates are used, viz., as a voucher to a purchaser of their names being on the register. And the claimants having acted on this statement by the company, there arises an estoppel as against the company, prohibiting them from denying that what it states is true. And the question then is, what does the certificate mean? Does it mean merely, that Stocken and Goldner are on the register, and the company have done their best to ascertain that they are entitled to the shares, but cannot say whether they are so entitled? Or does it amount to a statement that the company take upon themselves the responsibility of asserting that they are the registered shareholders entitled to the specific shares? I think the certificate must amount to the latter assertion. It is the company who are to keep and look after the register, and they are the only persons who have control over it, and they can refuse to register a person until he shows that he is legally entitled. Having, therefore, put the names of Stocken and Goldner upon the register, and granted them a certificate, the company are estopped after that statement has been acted upon, and cannot deny that those persons were the legal holders of the particular shares which have been transferred to the claimants. The claimants, therefore, are entitled to recover from the company the value of the shares at the time when they were deprived of them.

Brown, Q. C., asked that the Court would award interest in addition; he stated that the company paid 7 per cent. dividend, and that the com-

pany refused to recognize the claimants as shareholders on the 10th of October, 1866.

PER CURIAM. — The rule will be that the company do pay to the claimants the value of their respective shares on the 10th of October, 1866, at interest from that time at 4 per cent., as damages, together with costs.

Rule absolute accordingly.

KNOX v. EDEN MUSÉE, &c. CO.

1896. 148 *New York*, 441.¹

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 15, 1893, which affirmed a judgment in favor of the plaintiff entered upon the report of a referee.

This action was brought to recover damages alleged to have been sustained through the defendant's alleged negligence in failing to cancel three certificates of its capital stock, surrendered to it for transfer, which the plaintiff claimed he was induced to receive as valid, although other certificates had been issued in their stead.

The facts found by the referee were, in substance, as follows :

In May, 1891, the plaintiff loaned money to Reynolds and Jurgens, upon receiving, as collateral security, a pledge of twenty shares in the stock of the Eden Musée Americain Company, Limited, a New York corporation. Certificates for twenty shares were delivered to the plaintiff. It was represented to him that the shares belonged to Jurgens. He believed this statement, and also believed that the certificates were valid. Part of the loan is still unpaid.

Four certificates, for five shares each, were delivered to the plaintiff. These were originally valid certificates, which had been duly issued to the various parties named therein. Each certificate set forth that the person named therein was the owner and entitled to five shares of the capital stock, which were transferable only on the books of the company in person or by attorney on surrender of the certificate. Each certificate had printed upon it as an indorsement the usual blank form of power of attorney to transfer, and the powers of attorney on three of the certificates were duly signed in blank by the respective persons (Chase and Blish) named in the certificates as the owners thereof. (No claim was made by the plaintiff on the fourth certificate.)

In fact, these certificates did not belong to Jurgens. They had been surrendered to the company upon a transfer of the shares to other parties, and new certificates had been issued to represent these shares.

¹ Statement abridged. Arguments omitted. — Ed.

The certificates thus surrendered should have been cancelled by the officers of the company.

The by-laws of the company contained the following provisions :

“SECTION 2. Certificates of stock shall be numbered and registered in the order in which they are issued, and shall be signed by the president or vice-president, and countersigned by the treasurer, and the seal of the company shall be affixed thereto. All certificates shall be bound in a book and shall be issued in consecutive order therefrom; and in the margin thereof shall be entered the name of the person owning the shares therein, represented with the number of shares and the date thereof. Each certificate shall be receipted for in the certificate book. All certificates exchanged or returned to the company shall be cancelled by the secretary, and such cancelled certificates pasted in their original place in the certificate book, and no new certificate shall be issued until the old certificate has been thus cancelled and returned to its original place in said book. SECTION 3. Transfers of shares shall only be made upon the books of the company by the holder in person or by power of attorney, duly executed and acknowledged, and filed with the secretary of the company, and on the surrender of the certificate or certificates of such shares.”

The by-laws also provided, that the secretary should “have charge of the certificate book, transfer books, and stock ledger.”

The plaintiff had no knowledge of the by-laws.

In May, 1891, and for several years previously, Jurgens was the general manager of the company's business and was in charge of its office, subject to the oversight of the president. The stock certificate book was kept in a safe in the office. Jurgens was the only person who had the combination to this safe. The secretary never attended to any of the details of the transfer of stock and the issue of new certificates. The acts of cancelling surrendered certificates and pasting them in the certificate book, of making out new ones and impressing upon them the company's seal, had always been done, when done at all, by Jurgens, and it was the latter who had and exercised charge over the stock book, transfer book, and cancelled certificates.

The actual course of business usually pursued by the defendant in relation to transfers of stock was as follows : The certificates which were to be surrendered for transfer were taken to the office of the company in West Twenty-third street. A new certificate to be issued in place of those surrendered would be filled out, and this new certificate, after being signed by the treasurer and having placed upon it the seal of the company, would be presented to the president of the company, together with the old certificate in lieu of which it was issued, cancelled, and the president would thereupon sign the new certificate.

The four certificates of stock hereinbefore referred to, and the twenty shares of the defendant's capital originally represented by them, were in April, 1891, the property of Seligsberg and Company, a firm of which Theodore Hellman, who was and had been from its organization presi-

dent of the defendant, was a member. In April, 1891, Hellman accepted an offer for the sale of this stock to one Siebrecht, at \$114 a share. This offer was made through Jurgens, the manager of the defendant. Hellman took the certificates, indorsed as described, to the office of the company, but learning that the purchaser was not then ready to pay for the stock, he left the certificates there in the office safe, and under the sole care and control of Jurgens, to be cancelled by him when Siebrecht, the purchaser, paid for the shares. On April 27, 1891, which was about three weeks thereafter, Siebrecht's check for the purchase price of the stock was sent to Hellman by Jurgens, with a new certificate for twenty shares, which was completely executed except for the signature of the president, which had not yet been made to it. Hellman accepted the check, signed the new certificate as president, and returned it to Jurgens. The old certificates (being the four pledged to the plaintiff as aforesaid), which Hellman had left in the safe under the care of Jurgens at the company's office, were never cancelled or pasted in the stock certificate book. They were not shown to Hellman, either at the time he signed the new certificate to Siebrecht, or any other time down to the trial of this action, nor did he at the time he signed the new certificate, or at any time until January, 1892, ask for them or inquire as to their whereabouts, or have or seek any knowledge whatever concerning their cancellation or non-cancellation, existence or non-existence. They remained in the safe till after the new certificate for twenty shares was issued and delivered to Siebrecht, and were thereafter fraudulently taken therefrom by Jurgens and used through Reynolds in obtaining said loan from the plaintiff.

No officer of the company examined the books and cancelled certificates in the safe from April 27, 1891, till October 29 or October 30, 1891. The fact that the four old certificates aforesaid were uncanceled and outstanding was not discovered by any officer of the company until January, 1892.

One of the referees' findings of fact, numbered "Eleventh," was as follows:

The action of the president of the defendant in signing a new certificate of stock in the place of the four certificates then outstanding, without the production of such outstanding certificates, and without ascertaining that they had been cancelled, was a violation of his duty under the by-laws of the company, and constituted negligence on the part of the defendant. The failure of the defendant and of its officers and directors to exercise any proper supervision over the transfer of the old certificates and the issue of the new, or over the old certificates after they had been left with Jurgens, or over Jurgens' conduct with reference thereto, and leaving the three certificates Nos. 497, 498 and 517, with Jurgens in such negotiable form as aforesaid, also constituted negligence on the part of the defendant; and the negligence of the defendant as aforesaid was the cause of the loss to the plaintiff of the amount so loaned by him on the security of said three certificates to

the extent of what would have been their value if they had been genuine; and in respect to said three certificates the plaintiff was not guilty of any negligence which contributed to the loss.

As conclusions of law, the referee holds: 1st, that the defendant is estopped to deny the validity and genuineness of the three certificates, Nos. 497, 498, and 517; 2d, that the plaintiff is entitled to recover of the defendant the damages sustained by him by reason of his loan of money on the faith of said certificates, not exceeding the value of the shares represented by said three certificates if the same had been valid.

Charles Steele, and William D. Guthrie, for appellant.

Henry D. Hotchkiss, for respondent.

ANDREWS, C. J. The rigid rule of the common law which prohibited the assignment of choses in action was, in England, at an early day, relaxed to some extent to conform to the usages of merchants and the necessities of commerce, and at length, by the aid of statutes and judicial decisions, bills of exchange and promissory notes were completely taken out of its influence, and they came to have distinct attributes and qualities not pertaining to any other form of contract. They were not only made transferable by delivery and suable in the name of the transferee, but, contrary to the general rule of the common law, "honest acquisition" for value was held to give to the transferee a new and original title, wholly independent of that of the prior holder and subject to no infirmity which affected the paper in his hands. The real owner, who had been despoiled of the paper by robbery or theft, or who had lost it without negligence, was concluded from re-claiming it, and the maker, although he had been defrauded into executing it, could not be heard to allege the fraud as a defense against a *bona fide* holder. And the transferee, although he may have been negligent in taking it, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to the doctrine now settled, will prevail. These familiar but arbitrary principles applicable to commercial paper, originating in commercial policy, the encouragement of trade, the convenience of having some representative of money readily convertible and commanding confidence, while they operate in many cases with great severity upon the rights of innocent persons, have contributed greatly to stimulate commerce and advance the prosperity of states. The principles applicable to negotiable paper have been extended to embrace public debentures payable to bearer, and bonds of corporations, and some of the incidents of negotiability have either by custom or statute been applied to instruments not strictly negotiable. Certificates of stock, in business corporations, are embraced in the class last mentioned. They are not negotiable in form, they represent no debt, and are not securities for money. But the courts of this country, in view of the extensive dealings in certificates of shares in corporate enterprises, and the interest both of the public and of the corporation which issues them, in making them readily transferable and

convertible, have given to them some of the elements of negotiability. The owner of shares may transfer his title by delivery of the certificate with a blank power of attorney indorsed thereon signed by the owner of the shares named in the certificate. Such a delivery transfers the legal title to the shares as between the parties to the transfer, and not a mere equitable right. (*McNeil v. Tenth National Bank*, 46 N. Y. 325.) The transferee in good faith and for value, holds his title free from latent equities between prior parties in the line of transmission. Under the doctrine of implied agency and the application of the principle of estoppel to the situation, the true owner is in many cases precluded from asserting his title.

[Here the learned Judge stated the case of *McNeil v. Tenth National Bank*.]

In the well-known case of *New York and New Haven Railroad Company v. Schuyler* (34 N. Y. 30) the same principle of implied agency was applied to charge the corporation with liability in damages for spurious stock issued by Schuyler, the president and transfer agent of the company.

The courts have been frequently importuned to extend the qualities of negotiability of stock certificates beyond the limits mentioned, and clothe them with the same character of complete negotiability as attaches to commercial paper, so as to make a transfer to a purchaser in good faith, for value, equivalent to actual title, although there was no agency in the transferor, and the certificate had been lost without the fault of the true owner or had been obtained by theft or robbery. But the courts have refused to accede to this view, and we have found no case entitled to be regarded as authority which denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value. The precise question has not often been presented to the courts, for the reason probably that they have with great uniformity held that stock certificates were not negotiable instruments in the broad meaning of that phrase, but, whenever the question has arisen, it has been held that the title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a *bona fide* purchaser. (*Anderson v. Nicholas*, 28 N. Y. 600; *Bangor Electric Light & Power Co. v. Robinson*, 52 Fed. Rep. 520; *Biddle v. Bayard*, 14 Pa. St. 150; *Burstow v. Savage Mining Co.*, 64 Cal. 388. See *Shaw v. R. R. Co.*, 101 U. S. 557.) It may be observed that the elaborate opinion of Judge RAPALLO in *McNeil v. Tenth National Bank*, to show that the plaintiff in that case was estopped from asserting his title on the ground of implied agency, was quite unnecessary if a transfer of a stock certificate indorsed in blank to a *bona fide* holder conferred a title as against the true owner, irrespective of the fact whether he voluntarily parted with the possession or was deprived of it by felony or

fraud. It is plain, we think, that the argument in support of the judgment in this case, based on the complete negotiability of stock certificates, is not supported by, but is contrary to the decisions. If public policy requires that a further advance should be made in more completely assimilating them to commercial paper in the qualities of negotiability, the legislature and not the courts should so declare. Under the law as it has hitherto prevailed there does not seem to have been any serious hindrance in dealing with property of this character. It may, perhaps, be doubted, taking into consideration the interests of investors as well as dealers, whether it would be wise to remove the protection which the true owner of a stock certificate now has against accident, theft or robbery. The system of registry of negotiable bonds, which prevails to a considerable extent, authorized by statutes of some of the states, and of the United States, seems to indicate a tendency to restrict rather than to extend the range of negotiable instruments.

Nor, in our opinion, can the judgment below be sustained upon any principle of agency in Jurgens, express or implied, to issue the surrendered certificates, which, on the issue of the new certificates to Siebrecht, became mere vouchers in possession of the company. If it can be said that the direction of the president to Jurgens to cancel the certificates made him the agent of the company for that purpose, it was an authority to destroy and not to use. His act in abstracting them from the safe and uttering them as valid certificates had no relation to the authority conferred. It was not an act of the same kind as that which he was authorized to perform. He had no apparent authority to issue them as genuine certificates, because he had no authority to issue certificates for any purpose, and what he did was, as was said in *Manhattan Life Ins. Co. v. 42nd St. & G. S. F. R. R. Co.* (139 N. Y. 146), "a willful and criminal act perpetrated for private gain and not connected with any official authority or semblance of authority which he possessed as the defendant's agent." The certificates were, at all times after their surrender and before they were abstracted by Jurgens from the safe of the defendant, in the legal possession of the company. The company never placed them in the possession of Jurgens or invested him with the *indicia* of ownership. He had access to the safe as the mere servant of the defendant. The doctrine of implied agency is, we think, wholly inapplicable to the circumstances of this case.

We come, therefore, to consider the ground upon which the learned referee placed his judgment against the defendant, viz. : the negligence of the company. The claim of liability of the defendant on the ground of negligence is based on the fact that in violation of its by-laws it permitted the surrendered certificates to remain uncanceled in its safe, to which Jurgens had access, and thereby enabled him to commit the fraud, and upon the further allegation that the company neglected to exercise a proper supervision over its business and the conduct of its employees, and committed to Jurgens the management of its affairs without special inquiry into the manner in which he discharged his

duties. We are of opinion that the company was not chargeable with any negligence which gives a right of action for the injury caused to the plaintiff by the fraudulent use by Jurgens of the surrendered certificates. The surrendered certificates were placed by the company in its safe in its office, of which Jurgens had the key, and thereby, it may be said, afforded him the opportunity to commit the crime of which he was guilty, in abstracting and uttering them as valid. But it is not true as a general rule that a man may not intrust his property to the custody of his servant, except at the peril of losing his title thereto if the servant steals and disposes of it to another. There must be something more than the mere intrusting to a servant of the custody of a chattel and the consequent opportunity for theft, in order to preclude the master from reclaiming it, if stolen by the servant and sold to another. (RAPALLO, J., in *McNeil v. Tenth National Bank*, *supra*, p. 329.) The rule declared by ASHURST, J., in *Lickbarrow v. Mason* (2 D. & E. 70), frequently quoted, that "Whenever one or two innocent persons must suffer by the act of a third, he who has enabled the former to occasion the loss must sustain it," has no application to such a case. The case in which the rule was stated affords a good illustration of its application. The consignor and vendor of the goods had by the delivery of a bill of lading delivered the possession of the goods to the holder with power according to the law merchant to transfer them by indorsement of the bill, and it was held that as against a transferee in good faith for value, the right of stoppage in transitu was lost. It was a case where the vendor had by his affirmative act enabled the holder to commit a fraud upon his rights, and it was justly held that he should bear the loss rather than the innocent purchaser. The familiar statement of Lord HOLT, in *Hern v. Nichols* (1 Salk. 289), "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger," was made in a case where the question was whether a merchant was liable for the deceit of his factor in the sale of goods represented to be of one quality when they were of another. The principle announced by Lord HOLT has been frequently applied to such and similar cases. But the employment of a servant to whom is intrusted the master's property, with no power of disposition, is not alone such a putting of trust and confidence in the servant by the master as to enable the latter by his wrongful act to defeat the master's title. The rule which would convert the mere employment of a servant into an authority in him, as to third persons, to sell or dispose of his master's goods intrusted to him for safe keeping, would be highly dangerous, and has no sanction in the adjudged cases.

It remains to consider whether there were any special circumstances in this case which take it out of the general rule adverted to. Jurgens had been in the employment of the defendant for several years prior to the transaction in question, and nothing had come to the knowledge of the defendant which raised doubt as to his honesty and faithfulness.

The facts found by the referee show that the defendant reposed confidence in his integrity, and, so far as appears, the abstraction and uttering of the surrendered certificates was his first act of malversation during his employment. His power in respect to the issuing of certificates on the transfer of stock was clerical only. In case of transfer, he was accustomed to cancel the surrendered certificates and paste them in the certificate book prepare the new certificate and impress the company's seal thereon, and then procure the president of the company to sign it. In every case prior to the one in question the president signed the new certificate only, when the surrendered certificate was presented to him by Jurgens, cancelled, together with the new certificate. There was a departure from that practice in the single instance in question under the special circumstances found by the referee. The president of the company knew when he signed the new certificate that the old certificates had been surrendered and were then in possession of the company, because he had himself placed them in the safe, and the fraud of Jurgens was made possible because the president relied upon Jurgens to cancel the surrendered certificates as he had directed him. It is urged that the improper use made of the certificates might reasonably have been expected to result from leaving them in the safe of the company in his care uncanceled. In other words, the claim is that the company ought to have anticipated that Jurgens might commit the crimes of forgery and larceny, and put the certificates on the market if they were left uncanceled under his control. We do not assent to this suggestion. If the company knew that Jurgens was dishonest, or had reason to suspect his honesty, a different question would be presented. But it is not generally an omission of ordinary prudence that an employer deals with his employees on the assumption that those who have hitherto been faithful in the performance of their duties will continue so to be, or because he does not anticipate and provide against the possibility of their criminal acts. Breaches of trust and confidence unfortunately are not infrequent. But honesty is nevertheless, we believe, the general rule of human conduct, and one may indulge in this faith in human nature and trust those who have proved themselves worthy of it without subjecting himself to a charge of negligence if it should turn out that they afterwards yielded to temptation and used their position to the injury of others. "It is one thing to say that a man shall be amenable for such immediate consequences of his acts as a reasonable man might foresee and dread and, therefore, shun. But it is another and very different proposition to maintain that a man shall forfeit his property because he has done an act which will not be perilous unless others are guilty of misconduct which that act does not cause." (WILLIAMS, J., *Ex parte Swan*, 7 C. B. [N. S.] 447. See, also, BRAMWELL, L. J., *Baxendale v. Bennett*, L. R. [3 Q. B. D.] 530.)

The fact that in the particular instance the defendant did not observe the by-law, and issued the new certificate without the actual cancellation of the surrendered certificates, was not, we think, as to the plaintiff,

actionable negligence. It may be admitted that a business corporation is bound to exercise reasonable care in respect to the transfer of its shares. The defendant had adopted the usual precautions, and its by-laws required that transfers should be made only on the surrender and cancellation of outstanding certificates. The certificates on their face carried an assurance by the company that the shares represented had not been transferred on the books of the company, while the original certificates were outstanding. There was no representation on the face of the certificates that surrendered shares would be actually cancelled by the company. The company, however, had by the by-law provided that this should be done, and it is said, and it is undoubtedly true, that this regulation was in conformity to the usual practice of stock corporations. By-laws are primarily for the protection of the corporation enacting them and its stockholders. The regulation that transfers shall only be made on the books on surrender of the outstanding certificates is essential as well for the protection of the company as the dealers in the stock. The regulation for actual cancellation of surrendered certificates is a still farther protection. But can it be justly said that this latter regulation was so obligatory on the company that a single departure therefrom under special and peculiar circumstances, which gave an opportunity for Jurgens' crime, was, as to the plaintiff, actionable negligence? We think it was not. To constitute actionable negligence there must not only be a violation of duty owing by one to another or to the public, but the injury must be the natural consequence of the alleged negligent act or one which might reasonably have been anticipated. PARKE, B., in the *Bank of Ireland v. Trustees of Evans' Charities* (5 H. L. Cas. 389), where it was claimed a corporation was bound by the fraudulent affixing by its secretary of the seal of the corporation in his custody, to a power of attorney to transfer its funds in the Bank of Ireland, states the true ground of actionable negligence in such a case. Speaking for the judges he says: "They are all of opinion that the negligence which would deprive the corporation of their right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself." BLACKBURN, J., in *Swan v. N. B. Australasian Co.* (2 H. & C. 181), states the principle with even greater perspicuity. He says: "The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

The claim that the injury to the plaintiff was occasioned by the omission of the defendant to exercise proper supervision over the conduct of Jurgens has, we think, no force. There was an interval of about three weeks between the time when the certificates were surrendered to

the company and their abstraction and transfer by Jurgens. If during this period the officers of the defendant had examined the contents of the safe, it might have been ascertained that the certificates were uncanceled. An examination after that time would not have benefited the plaintiff, at least there is no evidence that a discovery of the fraud after it had been accomplished would have changed his position. The transfers of stock on the books of the company were comparatively infrequent. The president had reason to suppose that Jurgens would obey his directions and cancel the certificates, and the omission to inquire whether he had done so, during the period mentioned, is, as we think, quite insufficient to support the charge of negligence.

Finally, if the company had been the owner of some of its own shares, or if it had owned shares in other corporations which had been deposited in its safe for safe keeping, and they had been stolen and sold by Jurgens to the plaintiff, there can be no doubt that the company could reclaim them, and the loss would fall upon him. It is difficult to see how he could acquire a better right to the surrendered certificates or charge the company with damages resulting from Jurgens' crime.

Having reached the conclusion that there was no actionable negligence on the part of the defendant, it is unnecessary to consider the other questions argued at the bar.

The judgment below should be reversed and a new trial ordered, with costs in all the courts to abide the event.

All concur.

Judgment reversed.

NEW YORK AND NEW HAVEN R. R. CO. v. SCHUYLER.

1865. 34 *New York*, 30.¹

THIS is an action in the nature of a suit in equity, against Robert Schuyler and several hundred other defendants. The complaint was sustained by this court on demurrer, as will appear by reference to the reported case in 17 N. Y. 592. The object of the complaint was to have a large number of alleged false and fraudulent certificates and transfers of pretended stock of the company, made by Schuyler, and charged to be held by the defendants, adjudged spurious and void; and to compel the certificates to be brought into court and cancelled; and to enjoin the several defendants from further prosecuting actions then pending, and from bringing suits against the company to enforce such certificates and transfers, or to recover damages for any reasons connected therewith.

A large number of the defendants answered, setting forth various facts and grounds upon which they claimed that the plaintiffs were not

¹ The greater part of the case is omitted. — ED.

entitled to the relief sought, and that the certificates or transfers respectively held by them were, or ought to be, treated as valid and binding on the company; or damages awarded to them for injuries sustained by the alleged frauds of Schuyler, and many asking for relief by way of judgments for damages against the company.

The case was tried at Special Term before INGRAHAM, J. The court found various facts, some of which are hereinafter summarized. A judgment entered at the Special Term was affirmed at the General Term. From such affirmance the plaintiffs and some of the defendants appealed.

It appeared that, from 1847 to 1854, the issue of certificates, both for entirely new stock and for stock reissued upon transfers, was left wholly in charge of Robert Schuyler, the transfer agent of the company.

The charter provided that the shares should be transferred in such manner as the by-laws should direct. By-laws were adopted, according to which shares were transferable only on the books of the company by the shareholder or his attorney duly appointed, and on the surrender of the certificate held by him when any certificate had been issued. Each certificate issued recited that the person named therein was entitled to shares transferable on the books of the company by such person, or his attorney, on the surrender of this certificate. Schuyler, as transfer agent, was authorized to sign and issue certificates on a transfer from one shareholder to another upon the books and on the surrender of the previous certificates. He also had authority to issue certificates in precisely the same form to the original subscribers for the stock (there was a large increase in the capital stock in 1851, in conformity with a provision of the charter). He also had authority to dispose of the stock of the company not taken by the original subscribers (of which there was a large amount), and issue certificates in the same form to the purchasers. He also had authority to dispose of certain forfeited shares, and in such case issue like certificates. He also had authority to receive transfer to himself of shares on behalf of the company, and transfer the same to purchasers and issue like certificates to them.

From 1848 to 1854, Schuyler fraudulently issued stock in excess of the amount limited by the charter. There were over-issues of what purported to be the original stock. There was also "over-issue by transfer," Schuyler issuing new certificates for shares of already existing stock in cases where the previously issued certificates had not been surrendered but were still outstanding. In many cases where valid certificates of stock had been issued to R. & G. L. Schuyler for stock actually belonging to them, and outstanding to their credit on the books at the time, and while such certificates with the usual assignments and powers of attorney executed in blank were outstanding in the hands of *bona fide* holders, the stock was permitted to be transferred by R. Schuyler in the firm name to other persons, who took the same

for value, in good faith, without the surrender of the outstanding certificates.

The stock books kept by the transfer agent were not open to the inspection of the public. An examination of those books by the directors would have disclosed Schuyler's frauds at an early stage of the over-issue; and the directors were culpably negligent in not thus discovering the frauds.

Geo. F. Comstock and Wm. Tracy, for plaintiffs.

Twenty-four counsel appeared for various defendants.

DAVIS, J.

This somewhat summary disposition of the preliminary points of the case leaves an open path to its meritorious questions, some of which, however, may be disposed of even more summarily. One of these is the question whether the stock purporting to be created by the false certificates and fraudulent transfers of Schuyler can be valid stock of the corporation and become part of its capital. In the nature of things this is impossible. A corporation with a fixed capital divided into a fixed number of shares can have no power of its own volition, or by any act of its officers and agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the State can alone confer that authority and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being; and hence every attempt of the corporation to exert such a power before it is conferred, by any direct and express action of its officers is void; and hence every indirect and fraudulent attempt to do so is void; for if such a result cannot be accomplished directly by the whole machinery of the corporate powers, it is absurd to suppose that it can be produced by the covert or fraudulent efforts of one or more of the agents of the corporation. The Special Term was, therefore, right in holding that the spurious stock, attempted to be created by Schuyler in excess of the capital, formed no part of the capital stock of the company, but was utterly invalid; and it necessarily followed from the decision of this court when the case was before it on demurrer, that the plaintiffs were entitled to have all certificates and transfers which represented such spurious stock declared void and ordered to be cancelled.

Another important legal proposition in the case is so clear upon principle, and so distinctly settled by authority, that nothing but confusion can flow from its discussion. It will bear no more than plain enunciation. A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious or negligent tort or wrong which it commits, however foreign to its nature *or beyond its granted powers* the wrongful transaction or act may be. (*Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend.

31; Angell on Corp., §§ 382, 388, 391; *Albert v. Savings Bank*, 2 Mary. Dec. 169; *Goodspeed v. East Haddam Bank*, 22 Conn. 541; *Bissell v. Michigan Southern and Northern Indiana Railroad Co.*, 22 N. Y. 305-309, per SELDEN, J.; 1 Wend. Black. [note], 476; *Green v. London Omnibus Co.*, 7 C. B. 290 [N. S.]; *Frankfort Bank v. Johnson*, 24 Maine, 490; *Philadelphia and Baltimore Railroad Co. v. Quigly*, 21 How. U. S. 209; and cases cited by CAMPBELL, J.)

It follows, from this proposition, that if it were established in this case that the corporation itself issued the false certificates of stock and permitted the fraudulent transfers of spurious stock, it would be liable to the party directly deceived and injured by that transaction. The incapacity to create the spurious stock would be no defense to an action for damages for the injury. On the contrary, that very incapacity, since it would render the certificate or transfer a fraud and deceit, would itself be the cause of the injury and the basis of recovery. No court would hear the corporation assert that its wrongful act was beyond its chartered powers, and therefore ineffective to charge it with the injurious consequences of the fraud. But in this case the false certificates were issued and the spurious stock transferred by an officer of the corporation. A corporation aggregate being an artificial body — an imaginary person of the law, so to speak — is, from its nature, incapable of doing any act except through agents to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising. Hence the rule has been established, and may now also be stated as an indisputable principle, that a corporation is responsible for the acts or negligence of its agents while engaged in the business of the agency, to the same extent and under the same circumstances, that a natural person is chargeable with the acts or negligence of his agent; and “there can be no doubt,” says Lord Ch. CRANWORTH in *Ranger v. The Great Western R. R. Co.*, “that if the agents employed conduct themselves fraudulently so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation.” (5 House of Lords Cases, 86, 87; *Thayer v. Barlow*, 19 Pick. 511; 4 Serg. & Rawl. 16; 7 Wend. 31; *Frankfort Bank v. Johnson*, 24 Maine, 490; Story on Agency, sec. 308; Angell & Ames on Corp., sec. 382, 388.)

[After expressing the opinion, “that the plaintiffs are estopped by the facts and circumstances of this case, to deny the authority of Schuyler to do the acts from which the injury to the defendants has arisen.”]

But conceding that the whole question of this case is governed by the law of principal and agent, it becomes of grave significance to ascertain the scope and extent of the powers conferred on the agent. Herein, I think, the case essentially differs from that of the *Mechanics’*

Bank, 3 Kernan, 599. [*Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 New York, 3 Kernan, 599.] The question of that case is stated by Comstock, J., in 16 N. Y., at pages 154, 155, with succinctness and accuracy. He says: "In that case, the transfer agent of the defendants' corporation was authorized to sign and issue certificates of stock on a transfer from one shareholder to another upon the books and on the surrender of the previous certificates. The agent, for his own purposes, signed and issued certificates to a large amount where there had been no such transfer or surrender. These unauthorized and spurious instruments were in form precisely like those that were genuine and authorized. Trusting to their false appearance, the plaintiffs took one of them by transfer and advanced money upon it, which they recovered in the New York Superior Court. We held they could not recover, and reversed the judgment, placing our decision prominently upon the ground *that the acts of the agent were not within the real or apparent scope of the power delegated to him.*"

It now appears that the agent, in addition to the power thus stated, had authority also to issue certificates in precisely the same form, to the original subscribers for the stock, and to some extent did do so; that he had authority to dispose of the stock of the company not taken by the original subscribers (of which there was a large amount), and issue certificates in the same form to the purchasers; that he had authority to dispose of certain forfeited shares, and in such case issue like certificates; that he had authority to receive transfers to himself of stocks on behalf of the company, and transfer the same to purchasers and issue like certificates to them; that before the increase of the capital to 30,000 shares, he did issue to his own firm a large number of false certificates which became the basis of transfers on the books to third parties, and by some arrangement were absorbed into the enlarged capital as genuine stock; that he acted to some extent as financial agent of the company, and through his firm raised large amounts, "indiscriminately, on genuine and spurious certificates of stock," which were paid out on the check of the firm on behalf of the company and on its construction account; that to him was intrusted the keeping of all the stock accounts of the company and its dealers at the New York office, and in those accounts he entered all his transactions, both false and genuine; that the books were kept closed to dealers; that his management of the affairs of the office, and of all these various matters, was never investigated or questioned.

It is in all these facts that we are now to seek for "the real or apparent scope of the power delegated to him." As we descend from the sharp promontory of the *Mechanics' Bank* case to this broad plane of powers and their mode of use, we stand amongst new and far different lights and shadows. We find ourselves quite unable to say, with the able jurist in that case, "*He (Schuyler) had no power to sell stock at all, and none to issue certificates except as incidental to a sale between existing stockholders, and then it depended on the condition precedent*

of a transfer on the books and a surrender of a previous certificate for the same stock." Nor to say, "*His appointment in its very terms, which all dealers are supposed to have been acquainted with, did not include his acts, and there is no pretense that it was ever enlarged by any holding out, or recognition of his acts.*"

When his certificate, regular in form in all respects, is offered in the market, the buyer is not able to refer it to the narrow restrictions of the by-law, for how does it appear that it is not one issued to an original subscriber, where there was no transfer to be made, and no prior certificate to be surrendered; or that it is not one issued to a purchaser of the original stock which Schuyler was empowered to sell and certify in this manner; or that it is not of stock that has been transferred to the agent on account of the company and which he was likewise authorized to sell; or that it was not some of the forfeited shares which he was directed to sell and certify; or that it was not of the kind which, by "*some arrangement,*" is absorbable into the capital as genuine, even if it be in fact spurious; or that it is not issued to raise money for the benefit of the construction fund of the company; or that it is not of the spurious kind which the company have heretofore allowed to be cured by a subsequent acquisition of stock by the Schuylers, and a transfer thereafter under the power.

Whether it does not belong to some one of these classes there are no earthly means of ascertaining save by the representation of the agent. The books are sealed; but if open and most thoroughly investigated they would not necessarily negative the power to issue for some of the purposes for which authority had been given, directly or by recognition; for even if run down to absolute spuriousness it is still open to say, this is of the kind of spurious certificates upon which the company raise money for their construction accounts, or the kind which they legitimize by subsequent arrangements of the capital; or the kind which, by the custom of dealing becomes good, if a transfer be made under it at a moment when the Schuyler firm happens to have so much stock to its credit on the books. And the accounts for seven years show that all these kinds are treated on the same footing as genuine shares.

In this view of the extent of the authority with which Schuyler was clothed by the company, either by direct appointment or by recognition and ratification, or by actual enjoyments of the fruits of his acts, or by long acquiescence therein from which a presumption or implied agency arises, I have come to the conclusion that the issuing of the certificates by him must be held to be within the scope of the real and apparent authority which he possessed; and the remedy of the defendants is not prejudiced by the fact that he used and intended to use the avails for his own purpose. In short, they stand precisely in respect to the remedy where they would if the board of directors had issued the same certificates in fraud of their powers under the law, and obtained the defendants' moneys thereon.

But these views do not dispose of a question that has been argued in this case with an elaboration and power seldom equaled in a court of justice. From the manner in which the decision of the judges is stated in the *Mechanics' Bank* case, it is difficult to tell what precise points were designed to be passed upon by the court. It is open to conjecture that the case may have passed off on the ground of want of privity between the plaintiffs and defendants, as was intimated by SELDEN, J., in *The Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank* (16 N. Y. 142), or on the ground, as suggested by H. R. SELDEN, J., in *Griswold v. Haven* (25 N. Y. 598), "that Kyle, to whom the certificate issued, being privy to the fraud, had of course no claim against the company, and that his assignees could have no greater rights than himself;" or upon the mistaken idea that the court of errors, in reversing *The North River Bank v. Aymar*, has settled the law adversely to the opinion of the Supreme Court in that case.

But whatever may have been the views of other members of the court, there is no mistaking the ground on which the judge who pronounced the opinion intended to put the liability of a principal for the acts of an agent. It is, in brief, *that a principal is bound only by the authorized acts of his agent*. The proposition involved was fairly put by the learned judge in this form: "Suppose an agent is authorized by the terms of his appointment to enter into an engagement, or series of engagements, on behalf of his principal, and while the appointment is in force he fraudulently makes one in his own or a stranger's business, but in the form contemplated by the power, and which he asserts to be in the business of his employer by using his name in the contract, can the dealer rely upon that assertion, or is he bound to inquire and to ascertain at his peril whether the transaction is not only in appearance but in fact within the authority? According to the decision of the Supreme Court of this State, in the case of *The North River Bank v. Aymar* (3 Hill, 262), he can." The judge then proceeds to show that the case cited had been reversed by the court of errors; and then to discuss the question with his own clearness and vigor, reaching a conclusion which he expresses in these words: "The appearance of the power is one thing, and for that the principal is responsible. The appearance of the act is another, and for that, if false, I think the remedy is against the agent only. The fundamental proposition, I repeat, is, that one man can be bound only by the authorized act of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

The counter proposition was again stated by SELDEN, J., in *The Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank*, in this form: "It is, I think, a sound rule that when a party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has or is presumed to have any knowledge with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within

the knowledge of the agent and which cannot be ascertained by a comparison of the power with the acts done under it."

Manifestly, here is an "*irrepressible conflict*" between these propositions, and we are called upon to determine which expresses the settled law of this State.

. . . it is impossible to escape the conclusion that the law of this State, as settled by adjudication at this day, is, as put by H. R. SELDEN, J., in *Griswold v. Haven*, "*That where the authority of an agent depends upon some fact outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact.*" The contrary rule, though asserted with confidence and vindicated with great force in the case of *The Mechanics' Bank*, was not necessarily adopted by the court, and that case does not so determine. It may with confidence be asserted that all the cases in this State, both before and since, lay down a different rule from that supposed in the *Mechanics' Bank* case, to have been established by the court of errors; and so do the elementary writers upon whom we are accustomed to rely. (Story on Agency, 452; Paley on Agency, by Lloyd, 294, 301, 307; Bacon Abr., Tit. Master and S., K; 2 Kent Com., 620, notes, 1 Blk. Com., 432.) It were long, by quotation, to show that the cases just noticed necessarily rest on this doctrine. A short allusion to their facts must suffice. The condition of the authority in *The North River Bank v. Aymar*, was that the paper should be made in the business of the principal. In *The Butchers' and Drovers' Bank* case, that the drawee should have funds in deposit enough to pay the check. In *Griswold v. Haven*, that the grain for which the receipt was given should actually have been received. In *Exchange Bank v. Monteath* (so far as it rested on a question of agency), that the drafts should be for the use and benefit of the defendant's line of boats. In each of these cases, the extrinsic fact which constituted the condition of the authority was peculiarly within the agent's knowledge, and was necessarily represented to exist by the execution of the agent's powers. It might or it might not be discovered by inquiry. So in this case, in the narrow view in which we are now considering it, the condition upon which the agent could issue the certificate was, a transfer in the books and the surrender of a previous certificate, if any had before been issued. These facts are wholly extrinsic and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, and were represented by him to exist by the certificate itself. I can see no shade of difference between the question in this case and in those cited, and which seem to me to settle the law. The rule which governs this class of cases, in my judgment, rests upon a sound principle. As was said by SELDEN, J., in *Griswold v. Haven*, "The mode in which the liability is enforced in all these cases, is by *estoppel in pais*. The agent or partner has in

each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented." It goes back to the celebrated aphorism of Lord Holt, in *Hern v. Nichols* (1 Salk. 289), "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger," or as more tersely expressed by Ashurst, J., in *Lickbarrow v. Mason* (2 T. R. 70), "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." (Story on Part., § 108, and authorities there cited.) In truth, the power conferred in these cases, is of such a nature that the agent cannot do an act appearing to be within its scope and authority, without, as a part of the act itself, representing expressly or by necessary implication, that the condition exists upon which he has the right to act. Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as *res gestae* making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, you intrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only in fact authorizes the act which involves a representation, which, from his confidence in the agent, he assumes will be true; but it may be false, and the risk that it may be false because he gives the confidence and credit which enables its falsity to prove injurious to an innocent party. I have already shown how this principle in many cases sustains liability after all actual authority has been withdrawn, as between the principal and parties who have a right to infer that the authority continues.

The contrary doctrine would be singularly inconvenient, if not absurd, in practice. For instance, under a general power to draw bills, which means, of course, only in the business of the principal, no party could safely take a bill drawn by the agent without pursuing the inquiry whether it was drawn in such business, to extremes. If the peril is on

the party to whom the bill is given, nothing short of personal application to the principal himself can relieve it, for nowhere short of that is absolute certainty. Every intermediate appearance or representation may be false or deceptive, and the rigid rule of *actual authority* will be satisfied with nothing less than absolute verity. So, then, the general power carries no safety whatever, since each bill made under it must be verified as to extrinsic facts by resort for perfect security to the principal himself.

Or to bring the illustration nearer to this case: It is claimed that every receiver of a stock certificate, executed by an agent, must verify, at his peril, the extrinsic facts that a transfer of the stock has been made and the former certificate surrendered. But how? If he go to the board of directors they can only refer him to the transfer agent or the books kept by him, for these are alone their sources of information. If he resort to the books they are at best but other representations of the agent which, if they in form show a transfer, may still be deceptive, and nothing but a transfer of *actual stock* will answer the condition. He must therefore trace the lineage of the stock represented by the certificate to some point behind which no "strain upon the pedigree" will enable the corporation to bastardize the issue. Such a rule would be vastly detrimental to the business interests, both of corporations and of the public.

It would be far better to establish a rule that no man shall take an instrument made by an agent without first having the principal's certificate that it is genuine and authorized; and even this would be impracticable in corporations, for every new certificate, being another act of an agent, would only open a new circuit of inquiry. But such is neither the policy nor good sense of the law.

It is a mistake to suppose that the conventional rule of commercial negotiability has anything to do with this question, except in cases where the paper carries no notice on its face that it is made by somebody assuming to be an agent. That rule stands upon an arbitrary doctrine of the law merchant, and not at all upon any principle of estoppel. It extends only to instruments which usage or legislation has brought within it; and its substance is, that by force of the arbitrary rule the possessor of such negotiable instrument has power to give by delivery to a *bona fide* purchaser for value, a good title notwithstanding any defectiveness in his own. Hence, under it a finder or a thief may confer such title with none in himself, not because the loser is estopped by his misfortune from asserting his rights, but because from real or supposed commercial necessities, "*ita lex est scripta*." But it is a fixed requisite of the rule that the buyer shall be for value *without notice*, and therefore nothing that gives notice on its face is, in that particular, within the rule. So an instrument that shows on its face that it is made by one man for another, at once warns the taker to inquire if the assumed agent be authorized, and that question becomes one independent of the arbitrary rule of the law mer-

chant, and dependent on the doctrines that govern the law of principal and agent. (*Atwood v. Munnings*, 7 B. & C. 278; *Fearn v. Felica*, 8 Scott N. C. 241.)

I concur, therefore, with Judge SELDEN, when he asserts that in no respect, except as it touched the question of privity of contract, was the negotiability of the paper of any importance in the case of *The North River Bank v. Aymar* (25 N. Y. 602). In that case it appeared on the face of the paper that it purported to be made by an agent. A different rule as to the effect of negotiability may well obtain where the paper is negotiable within the law merchant, and bears on its face no notice whatever that it is made by some party other than the one it purports to charge, as where it is made in a firm name, or in the form and by the officers, through and by which a corporation can by law issue its authorized evidences of debt.

We have already seen how far privity is essential in actions of tort. (Redfield on Railways, 61 and note; *Gerhard v. Bates*, 20 Eng. L. & Eq. 129, &c.)

I shall not inquire how far the English cases, and especially the leading case of *Norway v. Grant* (10 C. B. 665), so much relied upon, may be in conflict with the law of this State. Both the Judges SELDEN have sought to show that *Norway v. Grant* is distinguishable from the cases under their consideration, and I will only add that if they did not succeed in pointing out the distinction, and the case really stands in conflict, *so much the worse for that case*.

We may come back, therefore, to the solid ground of *The North River Bank v. Aymar*, regarding it only as shaken down to greater firmness by the severe ordeal of *The Farmers' and Mechanics' Bank case*, and with confidence declare the true doctrine of this branch of the law of agency to be, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. In *Griswold v. Haven*, this rule was distinctly settled. The dissenting opinion touched only the right to maintain the form of action brought in that case, but a majority of the court held that the representation of the agent not only charged the principals, but estopped them from denying the actual possession of the wheat asserted to be in store, so as to defeat an action of trover or replevin to recover the property. In this view I see no ground upon which the plaintiffs can, in this case, be permitted to deny that Schuyler was acting within the scope of his authority in issuing the false certificates; and they are therefore to be treated as though issued by the board of directors.

[The judgments against the plaintiffs for damages were affirmed.]

BOSTON MUSIC HALL ASSOCIATION *v.* CORY.1880. 129 *Massachusetts*, 435.

COLT, J. In 1874, Howard L. Hayford sold five shares in the stock of the Boston Music Hall Association to his brother Nathan H. Hayford, to whom he delivered a stock certificate, and upon which he indorsed and signed a written transfer in the usual form. No transfer was made on the books of the corporation, and there was no provision in the charter or by-laws of the association requiring it. It was not until after the shares were levied on as the property of Howard L., in May, 1878, that the corporation was notified of the alleged sale and transfer to Nathan H. In the mean time Howard L., with the knowledge of his brother, collected the annual dividends declared on the stock, attended meetings of the stockholders, and served upon committees appointed at such meetings. Under the levy made in 1878, Barney Cory bought the stock as the property of Howard L.; and the question presented by this bill of interpleader is, which of the two acquired the title.

The case comes up on an appeal from the decree of a single judge in favor of Nathan H. Hayford, accompanied by a report of the evidence taken at the hearing. In the first place, it is contended that the evidence fails to show that the stock was sold and assigned to Nathan H. in good faith at any time before the levy. Upon this question of fact, the decision of the single judge will not be reversed, unless it clearly appears to be erroneous. *Reed v. Reed*, 114 Mass. 372. *Montgomery v. Pickering*, 116 Mass. 227.

The only evidence of the transaction in 1874 comes from the two Hayfords, who were the parties to it. But we cannot say that the fact that the apparent ownership remained unchanged for such an unusual length of time upon the books of the corporation, and that Howard L. received the dividends and continued to act as the real owner, is sufficient to lead us to believe that the judge erred in not treating it as sufficient to overcome the positive evidence of a valid sale of the property, coming from the two witnesses who were before him, and of whose truthfulness he had the best opportunity to judge.

In the next place, it is strenuously urged that, by force of the various statutes of this Commonwealth relating to the ownership and transfer of stock in corporations, authorizing the attachment of shares, requiring returns to the Secretary of the Commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there can be no transfer of stock, valid against the claims of an attaching creditor, unless such transfer be recorded in the books of the corporation. Gen. Sts. *c.* 68, §§ 10, 12; *c.* 123, §§ 59-61; *c.* 133, § 46. St. 1864, *c.* 201. The intention of the Legislature, it is said, must have been to provide for the owners of stock a convenient and uniform method of transferring title on the books of the corporation, which should be the only

valid transfer as to creditors, and others interested; and, although the statutes have not provided in express terms that, as to creditors, transfers shall not be valid till they are so recorded, yet such, it is contended, is the necessary implication, for otherwise the design of the statutes, requiring registration and making the shares liable to be taken for debts, would be defeated. But this consideration is not sufficient to control the law as long since settled by the decisions of this court. It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written transfer of the same to a *bona fide* purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. *Sargent v. Essex Marine Railway*, 9 Pick. 201. *Sargent v. Franklin Ins. Co.* 8 Pick. 90. *Fisher v. Essex Bank*, 5 Gray, 373. *Dickinson v. Central National Bank*, *ante*, 279.

It would not be in accordance with sound rules of construction to infer, from the provisions of several different statutes passed for the purpose of obtaining information needed to secure the taxation of such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the Legislature intended thereby to take from the stockholder his power to transfer his stock in any recognized and lawful mode. If a change in the mode of transfer be desirable, for the protection of creditors, or for any other reason, it is for the Legislature to make it by clear provisions, enacted for that purpose.

We see nothing in the facts which can be held to deprive Nathan H. Hayford of the stock in question, on the ground that he is chargeable with laches in not causing the transfer to be sooner recorded, or that he is now estopped from setting up his title to the shares in his possession. It must be taken, upon the findings of the judge, that Nathan H. bought these shares in good faith in 1874; and that all which the law required was done to vest a perfect title in him, as against an attaching creditor of Howard L. He was under no legal duty to have the transfer recorded in order to perfect his title as against strangers, and he can be charged with no neglect or laches which would involve the forfeiture of his title.

The evidence in the case does not require us, against the findings of the single judge, to find that Nathan H. is estopped to set up his title against a creditor of Howard L. The acts and declarations of the latter, after the sale, would not affect the title, except so far as they were authorized by Nathan H., and there is nothing to show any act or declaration authorized by the latter, with intent to give a false credit to Howard L., or that any creditor of his was in fact defrauded.

Decree affirmed.

F. C. Welch, for the attaching creditor.

J. P. Treadwell, for the transferee.

SCRIPTURE v. FRANCESTOWN SOAPSTONE CO.

1871. 50 *New Hampshire*, 571.¹

ASSUMPSIT for not delivering to the plaintiff certificates for forty-five shares of stock in the defendant company, which plaintiff had purchased of one Barton. Plaintiff purchased the stock of Barton on May 24, 1867. Barton transferred the same to him by his indorsement upon the back of the certificate. On Feb. 3, 1868, the said certificate so transferred was presented to the treasurer of the company, and a new certificate for those shares demanded by the plaintiff. The treasurer declined to issue a new certificate, for the reason that the shares had been attached as Barton's property, on January 28, 1868, in a suit brought by the Francetown Soapstone Company against Barton. At the trial the plaintiff proposed to introduce certain evidence to prove that the company had notice of the aforesaid sale and transfer before the attachment. Thereupon the cause was taken from the jury for the purpose of determining, as matter of law, whether the evidence offered was competent to prove notice or knowledge in the company; and whether, with such notice or knowledge, the attachment would be valid to hold these shares against the plaintiff.

A. W. Sawyer, for plaintiff.

Geo. Y. Sawyer & Sawyer, Jr., for defendant.

LADD, J. The sale and transfer of these shares were made by Barton to the plaintiff May 24, 1867; and the case shows that the plaintiff paid \$95 per share for them, the par value being \$100.

It is alleged in the declaration, that on February 3, 1868, the plaintiff caused the certificate and assignment to be delivered to the treasurer of the company; and it appears that the reason assigned for not issuing to him a new certificate was, that prior to that time, namely, on the 28th day of January, 1868, said shares had been attached as Barton's property on a writ in favor of the company against him.

If by the attachment a valid lien was created in favor of the company, it was under no obligation to enter the transfer on its books at the time the certificate was presented; and the plaintiff cannot maintain this suit.

The question then is, What effect shall be given to the attachment made January 28, 1868?

The plaintiff offered to prove that at the time of the sale said Barton was president of the corporation, and acted as its general agent in superintending the affairs thereof, and continued so to act until January 27, 1868, the day before the attachment was made; that the agent who succeeded Barton, and who procured the attachment and caused a levy to be made on the shares, was a director in 1867, and knew of the sale

¹ Statement abridged. Arguments omitted. — Ed.

and transfer of the shares from Barton to the plaintiff prior to the time of the attachment; and that the treasurer of the company had actual notice of the sale and transfer as early as June, 1867; and other facts tending to show knowledge of the sale by the corporation at or about the time of the transaction.

We think this evidence was clearly admissible for the purpose proposed. The president and treasurer, by the by-laws, were directors *ex-officio*; and it is fair to suppose that they were active members of the board, participating largely in the control and management of the affairs of the corporation. But even if those officers had not been members of the board of directors, there would probably be no difficulty in holding that notice to a general agent, who has the superintendence of the affairs of a corporation, is notice to the corporation, and therefore that the defendant is chargeable with knowledge possessed by its president and general agent, Barton.

Angell and Ames on Corp., § 305, and cases in note; *Hovey v. Blanchard*, 13 N. H. 145; *Marshall v. Ins. Co.*, 27 N. H. 157; *Campbell v. Ins. Co.*, 37 N. H. 35; *Patten v. Ins. Co.*, 40 N. H. 375; *Fitzherbert v. Mather*, 1 T. R. 12; *N. Y. & N. H. Railroad Co. v. Schuyler*, 34 N. Y. 84.

We are thus brought to the question whether the attachment made by the defendant, with knowledge that the shares had been previously sold and transferred by Barton to the plaintiff, will hold them, for the reason that the transfer had not been made on the books of the company according to the provision contained in the certificate.

It does not appear that any mode of transfer is provided in the charter, and the only provision in the by-laws on that subject is contained in Art. 10, as follows: "Shares may be transferred by assignment on the back of the certificate, and surrender of the certificate to the treasurer." This corresponds with the provision in the certificate, except that the words "only on the books of the company" appear in that instrument.

It is not necessary to inquire whether the provision contained in the by-laws was authorized by the charter; nor whether there is any difference in legal effect between a provision in the charter and one in the by-laws which have been adopted in pursuance of an authority conferred by the charter; nor whether the provision in the certificate should have any effect by way of contract between the share owner and the corporation; for we think that, by a fair construction of the general law of the State in force at the time of this transaction, a transfer of shares in a corporation of this sort, to be complete and perfect for all purposes, must be entered upon the books of the company — Rev. Stats., chap. 141; *Pinkerton v. The M. & L. Railroad*, 42 N. H. 424 — the object being, as is well said by defendant's counsel in their brief, "not only to give notice of the title, but to furnish an authentic record that would determine membership in the corporation, the right to vote, private liability for debt, liability to taxation, and all other incidents of ownership," &c.

It being admitted, then, that, for the protection of these various rights and interests of the corporation, the public, and creditors of the stockholders, the law provides that the title of a purchaser of shares shall not be complete, as against those having these various interests, until the transfer is entered on the books of the company, it becomes a very important inquiry to ascertain what is, in point of fact, the origin and basis of a purchaser's title to such shares when they pass from seller to buyer. Does it originate in and rest upon the contract of sale between the parties, or is it a creation of law, dating its birth from the record of the transfer on the company books?

A share in a corporation, which has for its object a division of profits among its stockholders, has been defined to be "a right to partake, according to the amount of the party's subscription, of the surplus profits from the use and disposal of the capital stock of the company to the purposes for which the company is constituted." Angell and Ames on Corp., § 557.

It cannot be disputed that this right is *property* of a definite and important character, with many of the qualities of visible, tangible, personal property, and having a value, and as capable of appreciation as vessels or merchandise, or other personal chattels. SHAW, C. J., in *Fisher v. Essex Bank*, 5 Gray 377. From this it follows, by inevitable inference, that it may be the subject of sale as much as any other species of property, real or personal, so that, as between vendor and vendee, the title may pass by their own act, and be thereby vested absolutely in the vendee.

It seems too clear for argument, that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them.

This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all to the delivery of personal chattels in other cases of sale, is, to hand over to the buyer his certificate, with a sufficient assignment by deed or otherwise to entitle him to a transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not.

If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a *bona fide* purchaser.

It is difficult to see any substantial difference between the position of this plaintiff after the sale and assignment of the shares to him by Barton and before a transfer was made on the books, and that of the grantee in a deed of land before his deed is recorded. In both cases

the seller has parted with his title, and, as to him, the buyer has acquired it. It is only third persons in either case whose rights or interests are affected by the omission.

In the case of an unrecorded deed, the grantor continues to be clothed with evidence of ownership after the conveyance, very similar to that which remains with the seller of shares before the transfer has been entered on the books. The record shows that he is still the owner of the land, when in fact he is not; and, so far as any interest a creditor can have in the matter is concerned, the same is precisely true in the case of shares in a corporation sold but not transferred on the books.

The statutes which we hold require the transfer of shares to be entered on the books of the corporation kept for that purpose, are certainly no more explicit and absolute than that which requires the recording of deeds. The object of the law, so far as creditors are concerned, is the same in both cases.

As between the parties the title passes by contract and not by the record in both cases alike.¹

It is difficult to suggest any reason for holding that actual notice of an unrecorded deed to a subsequent purchaser or attaching creditor shall be equivalent to a record, so far as that purchaser or creditor is concerned, which does not with equal force require us to hold, in the present case, that actual notice to the defendant of a sale of these shares was equivalent, so far as its rights as a creditor are concerned, to a transfer entered in due form upon its books. This view is sustained by *Gooding v. Riley*, 50 N. H. 400, where the chief justice, upon an exhaustive review of the authorities bearing upon the question, arrives at the conclusion that purchasers or mortgagees of personal property, having notice of a prior outstanding equitable title, are affected by such knowledge in the same way and to the same extent as the grantee of land is affected by knowledge of a prior unrecorded deed; that both stand upon the same equitable principle.

The same result, substantially, is reached, if we consider that the omission of the plaintiff to have the transfer recorded places him in the same position as a purchaser of chattels, who permits them to remain in the hands of the seller after the sale.

Taking that view, the consequence contended for by defendant's counsel does not follow. The circumstance of such retention of possession may be explained. It is true that, in the absence of explanation, a secret trust will be presumed; but when an explanation is offered, it is for the jury to say, under proper instructions, whether the explanation is sufficient; and the fact that possession was so retained, is for them to weigh in connection with all other evidence bearing upon the actual character and complexion of the transaction between the parties.

Here the defendant had notice of the sale and assignment, and, as

¹ A note by the reporter is omitted. — ED.

we hold, of all the facts attending the transaction, for the reason that Barton, its general agent, by whose knowledge it is bound, was a party to the transaction and knew all about it. Under these circumstances it can hardly be heard to say that it inferred fraud from the plaintiff's conduct, as a conclusion of law, when it knew, as matter of fact, that no fraud did really exist.

Suppose, after the sale by Barton to the plaintiff, Barton had sold the same shares again and applied the proceeds of such sale to his own uses. If the second purchaser were ignorant of the prior sale, he would get a good title, although Barton would have been guilty of a fraud against the plaintiff of the most gross and flagrant character. But if this second purchaser had notice of the former sale — was aware of the situation of the title as between Barton and Scripture — by concerting with the former to deprive the latter of his property he becomes a party to the fraud, and no process of reasoning, in logic or morals, will lead to any other result but that he would be equally guilty with the seller. To hold that such a purchaser acquired a good title would be to countenance the most scandalous bad faith and encourage dishonesty.

The difference between an attempt to gain a title under such circumstances by purchase and by an attachment is not very apparent, and certainly not very broad. At all events, we think it entirely clear that what cannot be accomplished in one way cannot be brought about in the other.

In any view we are able to take of the case, we think the question for the jury is, whether the sale by Barton to Scripture was a *bona fide* sale, or whether it was so tainted with a secret trust, or other element of fraud in fact, that it cannot be sustained; and upon that question the price paid for the shares as compared with their actual value, the omission of plaintiff to have the transfer recorded, and all other facts and circumstances tending to throw light upon the actual character of the transaction, will be proper evidence for the jury to consider. In short, that the sale may be attacked in the same manner and upon the same grounds as though the transfer had been entered upon the books of the corporation at the time the fact of the sale was brought to its knowledge.

Case discharged.

HOTCHKISS AND UPSON CO. *v.* UNION NATIONAL BANK.1895. 37 *U. S. Appeals*, 86.¹

CIRCUIT COURT OF APPEALS. Sixth Circuit.

Appeal from U. S. Circuit Court for the Northern District of Ohio.

Bill in equity by Union National Bank of Cleveland, Ohio, against the Hotchkiss & Upson Company, a Connecticut corporation, to enforce a lien upon stock of the latter company alleged to have been acquired by a pledge from Charles A. Hotchkiss. It appeared that Hotchkiss, as a collateral security for a loan, assigned in pledge to the bank certificates for 140 shares of the Hotchkiss & Upson Company. The assignment consisted in delivering the certificates to the bank; with a blank power of attorney for the transfer of the stock upon the books of the company, executed by Hotchkiss. The stock has never been transferred upon the books of the company to the bank, and no copy of the power of attorney was ever filed in the office of the company.

Subsequently to the above pledge, Hotchkiss embezzled a large amount of the funds of the Hotchkiss & Upson Company, of which he had charge as president.

It is contended that by force of the general laws of Connecticut relating to corporations a lien was given to the company upon the stock standing upon its books in the name of Hotchkiss for the amount of the indebtedness created by his embezzlements, and that this lien is paramount to that of the bank, for the reason that there was no transfer of the stock by Hotchkiss to the bank upon the books of the company, and no copy of the power of attorney, was filed in the office of the company as required by the law of Connecticut in order to make the assignment good as against the company.

The provision of the statutes of Connecticut giving the company such lien is found in section 1923 of the General Statutes of that state (Revision of 1887), which reads as follows: "When not otherwise provided in its charter, the stock of every corporation shall be personal property, and be transferred only on its books in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock owned by any person therein for all debts due to it from him." And section 1924 declares how such stock may be pledged, and the manner in which such pledge may be made effectual, as follows: "Shares of stock in any corporation, organized in this state under the laws of this state or of the United States, may be pledged, by executing and delivering a power of attorney for its transfer, with the certificate of stock therein mentioned, to any party to whom the pledge is made; but no such pledge, unless consummated by an actual transfer of the stock to the name of such party, shall be effectual to hold such

¹ Only part of the case is given. — ED.

stock against any person but the pledger and his executors and administrators, until a copy of said power of attorney shall be filed with the cashier, treasurer or secretary of said corporation."

The provisions of section 1924 were not complied with in the making of the above pledge. But the bank introduced evidence tending to show that the Hotchkiss & Upson Company had notice of the pledging of these shares before the embezzlement commenced. The court below found that the company had such notice; and *held*, that the bank's lien was superior to that of the company.

A decree was made, sustaining the bank's lien upon the 140 shares pledged as above stated.

J. E. Ingersoll, for appellant.

W. B. Sanders (*Squire, Sanders & Dempsey* were on the brief), for appellee.

SEVERENS, J. The appellant contends, in the first place, that there was neither any transfer of the shares of the company upon its books upon the occasion of their being pledged by Hotchkiss to the bank in payment of his loan for \$15,000, which is admitted; nor any written notice filed in any proper office of the company of the assignment of the stock, nor any copy of the power of attorney for its transfer, which is also admitted; and that actual notice of such assignment was ineffectual to bind the company. This last contention presents the question to be decided, and it seems to turn upon the construction and effect to be given to the laws of the state of Connecticut. The appellee insists that, while the pledgee of shares of stock in this Connecticut corporation was bound to take notice of the provisions of the charter by which it was organized, yet that, if that stock was transferred in some other state than Connecticut, the transferrer would not be bound by implied notice of the general laws of Connecticut relating to corporations. It is unnecessary, in the view which we take upon another branch of the case, to express an opinion as to whether this contention can be sustained or not. For, assuming that the bank was bound to take notice, not only of the charter, but the general laws of Connecticut affecting the Hotchkiss & Upson Company, we think it was competent for the bank to show that the Connecticut corporation had the notice of the pledge of its stock to the bank for the payment of the \$15,000 note, which it was the purpose of section 1924 of the laws of that state, above quoted, to secure.

It is a widely prevalent doctrine, applying to a variety of statutes enacted for the purpose of protecting parties dealing bona fide with property upon the assumption of its ownership by the persons dealing with them, against prior liens and conveyances, that, notwithstanding the generality of the language of such statutes declaring that such former liens and conveyances should be held void, if not registered in conformity with the provisions of the statute, as against subsequent purchasers, yet, seeing that the whole object of such provisions was to guard the subsequent purchaser against transfers of which he had no

notice, if the object of the statute had been subserved by actual knowledge of the fact, the prior transferee would be protected. And there is no reason why this should not be so. Such laws are not designed to accomplish so unjust a result as that a person having knowledge of another man's equities may defeat them by an act of his own, taken with such knowledge. Converting those statutes to such purpose would be quite contrary to the spirit of their enactment. That such is the general doctrine upon this subject cannot, we think, be disputed. The cases are too numerous to justify a review of them here. Many of the principal decisions are collected in 1 Jones, Mortg. (5th Ed.) § 538, and the result of them stated; and it is there said: "The doctrine is the same under statutes which declare without qualification that an unacknowledged or unrecorded deed shall be void as against purchasers, or as against all persons who are not parties to the conveyance."

The rule is the same in respect to personal property. No distinction in the application of the doctrine can be based upon a distinction between the two classes of property. Jones, Chat. Mortg. (4th Ed.) § 308. It rests upon a broad and fundamental equity. It must be conceded that there are occasionally to be found cases which seem to lead to a different conclusion, but the general current and weight of authority is as above indicated. No doubt there are exceptions to this rule where the statute goes further than to provide for the mere giving of notice, and expressly declares that the instrument shall only become valid upon its registration. In such case the condition is made essential to its validity.

The decisions of the supreme court of the state of Connecticut show beyond doubt that the rule which prevails in that state upon this subject is the same as the rule which prevails generally in the courts of the several states and of the United States, and it may be regarded as the settled rule of Connecticut that statutes of a kindred character, and having the same purpose as that here under consideration, are to be construed, not as rendering prior transactions void as between the parties themselves or others who had equivalent notice of such transactions, and who, therefore, were in no predicament requiring protection, but as provisions whose whole scope and intended effect was the protection of parties who had an equity arising upon the fact of their having altered their situation, in reliance upon the apparent condition of things. *Wheaton v. Dyer*, 15 Conn. 307; *Blatchley v. Osborn*, 33 Conn. 226; *Hamilton v. Nutt*, 34 Conn. 501.

These cases indicate the law of the state, and the rule by which the construction of its statutes should be governed, and are controlling. *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757; *Hammond v. Hastings*, 134 U. S. 404, 10 Sup. Ct. 727; *Bishop v. Globe Co.*, 135 Mass. 132.

The cases of *Platt v. Axle Co.*, 41 Conn. 255, and *First Nat. Bank v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22, do not declare any contrary rule as applicable to the provisions of the statute here in ques-

tion. On the other hand, it is clear from the discussion of the question by the court in the last cited case that they adopt as the test of decision the principle upon which that court had acted in previous cases turning upon the construction and effect of statutes designed to accomplish in respect of other species of property the same kind of protection against secret incumbrances and conveyances; for the court, in distinctly announcing the rule of their decision, say: "The equitable interest of the bank [the pledgee] stands postponed to the publicly recorded lien of the insurance company [that is, the lien declared by the statute] by the principle which postpones an imperfect to a completed attachment, or a secret, unrecorded mortgage of land to one which, although later in time, is recorded by a grantee who has no notice of the first."

In neither of the two cases last cited was there any notice to the corporation of the pledge of the shares of its stock, and all that was said by the court in either case has reference to such a condition of things; and the expressions of the court are in harmony with and much like those of the courts generally when discussing the consequences of a failure of the first grantee or mortgagee to record his conveyance where subsequent purchasers in good faith had parted with their property in reliance upon the apparent ability of the grantor to convey or pledge. As to such cases, all that is said in these two Connecticut cases may be fully conceded, but the rule of their decision furnishes quite completely the distinction which shows that the present case is not within the purpose of the statute, and not affected by it, if the claim of the bank that the Hotchkiss & Upson Company had actual notice of the pledge of its stock before the incurring of any liability by Hotchkiss to it is sustained by the proof. It would seem to admit of much doubt whether a debt or liability incurred by positive malfeasance of an officer of the corporation was a debt within the meaning of the statute. The natural inference to be gathered from the language of the statute and the nature of the subject would seem to be that the debts referred to were such as would arise upon an actual contract, for it would be in such cases that the question whether any reliance had been placed by the corporation or any other person upon the state of the records and files in the office of the corporation would arise.

If we are right in supposing that the statute was enacted simply for the purpose of giving notice, it would seem to follow that it had no reference to a case like this, where the liability arises only upon an implied assumpsit founded on a tort. But, passing this question, we proceed to the other branch of the case, and consider the question whether the Hotchkiss & Upson Company had actual knowledge of the pledge of the shares to secure the \$15,000 note. [The court *held*, that the company had notice.]

Decree affirmed.

FORT MADISON LUMBER CO. v. BATAVIAN BANK.

1887. 71 Iowa, 270.

ACTION in equity to compel the defendants to interplead, in order that their respective claims against each other, and against the plaintiff company, may be determined. The facts appear to be that one Weston was at one time the owner of certain shares of stock in the plaintiff company, and the same stood in his name on the books of the company. In 1883 he borrowed money of the defendant, the Batavian Bank of La Crosse, Wisconsin, and assigned to it certificates of his stock as collateral security; but no transfer of the stock was made upon the books of the company. Afterwards he became insolvent. Among his creditors were the defendants D. Hammell & Co., the Clark County Bank and the Neillsville Bank. These creditors brought actions upon their respective claims in the circuit court of Lee county, Iowa, and caused writs of attachment to be issued, and levied upon the stock in question. At the time of the levy they had no knowledge of any transfer of the certificates by Weston. Shortly after the levy the Batavian Bank procured the secretary of the plaintiff to indorse upon the stubs of the book from which the certificates had been detached an entry or memorandum of a transfer. This action is brought for the purpose of procuring a determination of the question as to whether the rights of the Batavian Bank, as pledgee, are subject to the attachments, or the attachments subject to the rights of the Batavian Bank. The court held that the attachments were subject to the rights of the Batavian Bank. The defendants D. Hammell & Co., the Clark County Bank and the Neillsville Bank appeal.

Casey & Casey, for D. Hammell & Co., appellants.

M. C. Ring, *R. F. Kounts* and *Casey & Casey*, for the other appellants.

C. W. Bunn and *W. J. Knight*, for the Batavian Bank.

Van Valkenburg & Hamilton, for the other defendants.

Frank Hagerman, for plaintiff.

ADAMS, C. J. The question whether a transfer of stock in an incorporated company in this state, when not entered upon the books of the company, is valid, as against attaching creditors of the assignor without notice, is now presented for the first time in this court. Its determination must depend upon the view which should be taken of the meaning of the provision found in section 1078 of the Code, and which is as follows: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by and to whom transferred, the numbers or other designation of shares, and the date of the transfer."

The question now presented does not arise between the parties to the transfer. Without any question, the transferee will hold the stock, as against the transferer, for all the purposes for which the transfer was made. The question arises between one of the parties to the transfer and others who were not parties, and who dispute the validity of the transfer. If we give the statute a literal construction, we must hold that the transfer is not valid. To hold otherwise, we should be obliged to enlarge the exception. The rule would be that the transfer is not valid, except as between the parties, and except as between the transferee and the attaching creditors of the transferer. But ordinarily, in the construction of a statute, an exception is not to be enlarged.

The question, however, is not free from difficulty. It is urged by the appellee, the transferee, that an attachment can in no case bind more than the interest of the debtor; and, if the transfer is valid between the parties, it is said that it follows, from the necessity of the case, that the attaching creditor of the transferer acquires a lien only upon such interest as the transferer has left, if any.

That there is plausibility in this argument cannot be denied. But in our opinion it is not sound. It would carry us too far. It would make a transfer that is valid between the parties to it valid as against all persons claiming under the transferer. But no one pretends that this is so. If the transferer sells again, and to an innocent purchaser for value, who obtains a transfer upon the books, no one doubts that he would become both the legal and equitable owner; and this is true though the transferer had, in one sense, no interest in the stock which he could sell. It is entirely competent, then, for the legislature to provide arbitrarily that a given transfer shall be deemed by a court valid or invalid, according to the parties which shall be before the court. The transfer is valid if the parties before the court were the parties to the transfer, and otherwise not. This, at least, is the rule of the statute, and must be followed, unless some equitable consideration controls. If the attaching creditors of the transferer had knowledge of the transfer, it may be that a court of equity would protect the transferee's rights. It has frequently been so held, but that question is not before us.

Our conclusion thus far has been based upon what seems to be the fair meaning of the language of the provision. But we are entitled to take a broader view, and look at other provisions. It is provided in the same section that the "books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same." The above, it will be seen, is a provision that the books shall show, at any given time, precisely who the stockholders are at that time. The books, too, shall be kept open for inspection by any one. Where a provision is made for a record of spe-

cific facts, and another provision that the record shall be kept open for inspection by any one, the intention must be that any one inspecting the record should be entitled to rely upon it as true; and, if a person inspecting the record expends money upon the faith of it, any other person through whose negligence the record fails to show the truth should be estopped from setting up its untruthfulness.

It is contended by the appellee that the provision for a record, designed to show who the stockholders are at any given time, is for the sole benefit of the corporation itself. But there is nothing in the provision that calls for such construction. Besides, nothing can be clearer than that the record is for the benefit of any one who may desire to inspect it, because it is expressly provided for such.

It is contended by the appellee that a mere attachment of stock should not have precedence over a prior assignment, not made of record, because the attaching creditor has expended nothing but his labor and the costs. By way of argument, it is said that an attachment does not take precedence of an unrecorded deed. But such a case differs in this. The statute expressly requires transfers of stock to be recorded; it does not require that deeds shall be.

Stock in an incorporated company is personal property. Transfers of personal property, to be valid as against attaching creditors, should be attended by a visible change of possession, or else evidence of the transfer should be spread upon a public record. We have an express provision of statute for property where a visible change of possession can be made. In the case of stock in an incorporated company, no visible change of possession can be made. Stock is a share in the interests and rights of the corporation. Certificates are mere evidence. They may never be issued. It is not essential that they should be. When issued, they are merely for convenience. The object of the imperative provision that transfers of stocks shall be recorded unquestionably is that the ownership may be made apparent.

Chief Justice SHAW, in *Fisher v. Essex Bank*, 5 Gray, 373, (380), in speaking of stock in an incorporated company, said: "It is of importance that the title be certainly and easily ascertained, that the mode of acquiring and alienating it may at any time be made available by process of law for the debts of the owner." Again, speaking of the necessity of a record of the transfers as passing title, and of a levy according to the record, he says: "The shares [otherwise] could never be attached, for the officer could have no means of obtaining possession of the certificate from a reluctant debtor adversely interested, and without it the shares might pass the next day to a purchaser without notice." Again he says: "It is necessary to fix some act, and some point of time, at which the property changes, and rests in the vendee; and it will tend to the security of all parties concerned to make that turning point consist in an act which, while it may easily be proved, does at the same time give notoriety to the transfer."

In support of the conclusion which we have reached, that the statute

in question was designed in part for the benefit of attaching creditors, we will refer to another provision of the statute. The sheriff must, as nearly as the circumstances will permit, levy upon property fifty per cent greater in value than the amount of the debt as sworn to. Code, § 2954. Now, if the construction contended for by the appellee is correct, the attaching creditor and sheriff, proceeding strictly according to law in attaching stock, and exhausting their ability to secure the debt by such attachment, cannot know whether any security at all has been obtained. The certificate holder may keep himself concealed until the very moment when the stock is offered for sale on execution, and it is sufficient if he then appear, and give notice of his claim. . We cannot think that the statute was designed to admit such a result. We may say, indeed, that the very mode of attaching stock provided by statute seems to be a legislative construction of the statute in question.

We come, now, to inquire how the question stands upon the authority of adjudicated cases.

In Maine the statute provides that "a transfer of shares is not valid, except between the parties thereto, until it is so entered in the books of the corporation." The provision is identical with the provision of our own statute. In *Skowhegan Bank v. Cutler*, 49 Me. 315, a question arose as to whether an attachment would take precedence of an unrecorded assignment, and it was held that it would.

In Illinois it is provided that shares of stock in a corporation can be transferred only upon the books of the corporation. In *People's Bank v. Gridley*, 91 Ill. 457, a question arose as to whether the levy of an execution would take precedence of a transfer of shares not entered upon the books. It was held that it would. The action was brought to enjoin the sale on execution. The point was made that the execution creditor, who had merely levied, was not an innocent purchaser for value, and that, not being such, the transfer, though not entered upon the records, might be set up against him; but the court held otherwise. It is true, the Illinois statute differs a little from ours. It provides that transfers can be made only on the books of the company. It does not, like our statute, expressly provide that a transfer not entered upon the books will be good as between the parties to the transfer. But the difference, in our opinion, is not material. The statute is the same in effect. It is well settled that, under a statute like the Illinois statute, a transfer not entered upon the books is good between the parties. The case, then, appears to be strictly in point.

The same view was taken in *Sabin v. Bank of Woodstock*, 21 Vt., 353, and *Cheever v. Meyer*, 52 Id., 66. In the former case, Chief Justice REDFIELD said: "We entertain no reasonable doubt that . . . all persons unaffected with notice to the contrary are at liberty to act upon the faith of the title being where it appears upon the books of the company to be." In *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507, Chancellor COOPER cites the case, and refers to it approvingly.

In Wisconsin the statute pertaining to the transfer of stocks is like

ours, and in *Application of Murphy*, 51 Wis., 419, 8 N. W. Rep., 419, a construction was put upon it which sustains the appellants in the case at bar. The court said: "We think that the meaning of the law is that all transfers of shares should be entered, as here required, upon the books of the corporation; and it is equally clear to us that all transfers of shares not so entered are invalid as to attaching or execution creditors of the assignors, as well as to the corporation and subsequent purchasers in good faith."

In *Pinkerton v. Manchester & L. R. Co.*, 42 N. H., 424, (462), an attachment, made without notice of a prior transfer not entered upon the books, was held to take precedence of it. The court said: "As to goods and chattels in possession, a substantial change of possession is by our law essential when it can be had. In the case of stock, the natural and appropriate indication of ownership is the entry upon the stock record."

In Connecticut an attachment was upheld as against a prior assignment not entered upon the books. *Northrop v. Newton & Bridgeport Turnpike Co.*, 3 Conn. 544.

It is claimed by the appellee that in New York, New Jersey and California it has been held otherwise; and it may be conceded that this is so, though we are not prepared to say that all the statutory provisions in those states bearing upon the question are quite the same as in this.

The case of *Black v. Zacharie*, 3 How., 483, is cited by the appellee. In that case language was used which might seem to support the appellee's position, but the case was essentially different from the one at bar. The attaching creditors had notice of the assignee's rights at the time the attachment was levied.

The appellee also cites *Moore v. Walker*, 46 Iowa, 164. But the pretended attachment in that case was made before the assignment, and would unquestionably have taken precedence of it if it had been properly made; but it was not, and had no validity, regardless of any question of transfer. It was expressly held that the provision of statute now in question (section 1078, Code,) had no application to the case. The remark, then, in the opinion, in regard to the scope of that section, does not have the force of an adjudication.

There is no question in regard to the preponderance of authority. It is clearly on the side of the appellants. But we are not influenced more by this fact than what seems to be the plain language and intent of the statute, and the difficulty and uncertainty which would often attend securing debts by attachment of stock, if stock, as against attaching creditors, can be transferred by mere delivery of the certificates, and if the books provided expressly for inspection by such creditors are to serve especially the purpose of a false scent.

We think the judgment must be

Reversed.

CONTINENTAL NAT. BANK v. ELIOT NAT. BANK.

1881. 7 *Federal Reporter*, 369.

U. S. CIRCUIT COURT. District of Massachusetts.

LOWELL, J. R. B. Conant was the cashier of the Eliot National Bank, of Boston, and owned 158 shares of its capital stock. Each of his certificates contained these words: "Transferable only on the books of the bank by the said Conant, or his attorney, on the surrender of this certificate." The Continental National Bank, of New York, was the regular correspondent of the Eliot Bank. In April and May, 1877, Conant borrowed \$9,500 of the Continental Bank, in two sums of \$5,000 and \$4,500, and sent them as collateral security certificates for 95 shares of stock of the Eliot National Bank, with a power of attorney to transfer them upon the books, but they were not so transferred. The by-laws of the bank provide that the stock shall be assignable only on the books; that when stock is transferred the certificate shall be returned to the bank and cancelled, and a new certificate issued. In July, 1878, Conant confessed to the directors of the Eliot Bank that he had embezzled the funds of the bank to the amount of about \$70,000. They required him to resign his position as cashier, which he did, and he has since been convicted, and is now serving a sentence of imprisonment for his fraud. The Eliot Bank attached his shares in an action which is still pending in the superior court for Suffolk county. Afterwards the Continental Bank sent to the Eliot Bank the certificates and powers of attorney, and demanded a transfer and new certificate, which was refused. This bill is filed to require the transfer to be made, or for damages, or other relief. Conant is made a defendant, and the bill as against him has been taken *pro confesso*. The officer is likewise a defendant, but it is admitted that no decree can be made against him.

The only question of fact in dispute is whether the Eliot Bank, before attaching the shares, had notice that they had been pledged, or mortgaged, to the complainants. Conant testifies that at the meeting of the directors at which he confessed his misdoings, he was asked what assets he had, and mentioned certain shares of mining stock, and other things; and that the president asked about these bank shares, and was informed of the fact that they were pledged to the New York banks for their face value. Conant, soon after leaving the directors' room, consulted Mr. Morse, an attorney of this court, who went at once and saw the directors before they had left the bank; and he testifies that he was told there by some one or more of them that this stock was pledged. On the other hand, none of the directors remember such a conversation; and some of them are confident that none such can have occurred. If it occurred, it is admitted that the attachment could not hold because the attaching creditor had notice of the transfer. *Black v. Zacharie*, 3 How. 483.

I am inclined to think that the affirmative evidence must prevail in this case; but there is so much doubt in my own mind, that I have thought best to examine the disputed question of law, whether the attachment would take precedence if made without notice to the attaching creditor of the unrecorded transfer.

The arguments have been very thorough on both sides, and a great many cases have been cited. It has been very ably urged that by the law of Massachusetts the attachment would have the preference. This I consider doubtful; but the decision does not depend upon the law of Massachusetts.

1. It is not important to consider whether the contract was consummated in Massachusetts or in New York. The negotiability or transferable quality of the stock of a national bank depends upon the laws of the United States. *Dickinson v. Central National Bank*, 129 Mass. 279. In *Merchants' Bank v. State Bank*, 10 Wall. 604, the admitted law and usage of Massachusetts, where both the national banks were situated, and where the transactions took place, were wholly disregarded by the majority of the supreme court. The negotiability of foreign scrip in England is not governed by the law of England, but by the law of the foreign country, which may be proved by the general usage of brokers and others dealing with such scrip. *Goodwin v. Roberts*, 1 App. Cases, 476. The time and mode of attaching property, and its effect in general, are part of the law of the forum; but its operation upon unrecorded transfers of shares in national banks is regulated by the law which creates the shares and provides for their conveyance and registration. That law is section 5139, Rev. St., which provides that shares may be transferred on the books of the association in such manner as may be prescribed by the by-laws or articles of association. Such a law, in Massachusetts, might possibly mean that creditors could attach the shares as the property of the recorded owner. *Blanchard v. Deedham Gas-light Co.* 12 Gray, 213. I have already said that I doubt if this is now the law of Massachusetts, and I shall return to the subject presently; but that law favors attachments in certain classes of cases to an unusual extent.

2. It is a general rule that creditors, whether they proceed by an attachment on *mesne process*, seizure on execution, creditor's bill, or through an assignee in bankruptcy, must take their debtor's property subject to all equitable as well as legal charges, liens, or opposing titles. *Willes, J.*, in giving judgment in the Queen's Bench in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before, in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law. *Pickering v. Ifracombe Ry. Co.* L. R. 3 C. P. 235, 251.

It has been the law of the lord mayor's court in London, from the time of Richard I., that an equitable assignment of a *chose in action*

should prevail against an attachment. *Westoby v. Day*, 2 E. & B. 605. This application of the rule obtains in Massachusetts, and in the United States generally, though a few courts hold otherwise. Drake on Attachments, c. 24; *Thayer v. Daniels*, 113 Mass. 129, and cases cited.

The doctrine is so familiar that I will merely cite authorities to show that it is the general rule in Massachusetts as well as elsewhere. The exceptions to it in this state I will consider afterwards. See *Wakefield v. Martin*, 3 Mass. 558; *Dix v. Cobb*, 4 Mass. 508; *Kendall v. Lawrence*, 22 Pick. 540; *Kingman v. Perkins*, 105 Mass. 111; *Thayer v. Daniels*, 113 Mass. 129; *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435.

3. The incorporeal property of the shareholder in a company of this sort is represented by his certificates; and, if these are conveyed, the failure to record the conveyance is not evidence of such a constructive fraud as sometimes arises from the possession of chattels after the property has been parted with. On the contrary, it was proved in early cases to be the usage, and is now adopted by the courts as law based on such usage, that the possession of the certificates, with a power to transfer them is *prima facie* evidence of title; and if, in fact, the possessor has given value, his title cannot be impeached even by subsequent purchasers who did not receive the certificates, much less by creditors of the transferor. In late cases these certificates are likened to bills of lading and other *quasi* negotiable securities. See *Black v. Zacharie*, 3 How. 483; *Bank v. Lanier*, 11 Wall. 369; *Johnson v. Laflin*, (S. C. U. S.) 12 Cent. L. J. 440; *U. S. v. Vaughan*, 3 Binney, 394, approved in *U. S. v. Cutts*, 1 Sumn. 133; *Finney's App.* 59 Pa. St. 398; *Wood's App.* 10 Weekly Rep. 125; *Smith v. Crescent City Co.* 30 La. Ann. 1378; *Bridgeport Bank v. Schuyler*, 34 N. Y. 30; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Winter v. Belmont Mining Co.* 53 Cal. 428; *Fraser v. Charleston*, 11 S. C. 486; *Strong v. Houston R. Co.* 10 Weekly Rep. 28; *Broadway Bank v. McElwath*, 13 N. J. Eq. 24; *S. C.* 24 N. J. Eq. 496; *Prall v. Tilt*, 28 N. J. Eq. 483; *Merchants' Bank v. Richards*, 6 Mo. App. 454; *Conant v. Seneca Co. Bank*, 1 Ohio St. 298; *Duke v. Cahawba Navigation Co.* 10 Ala. 82; *Ross v. S. W. R. Co.* 53 Ga. 514.

In many of the foregoing cases there were laws providing for the transfer of shares upon the books of the company. But the courts held that this registration was intended chiefly for the convenience of the company, to enable it to know who should have dividends and who should vote. No doubt it is sometimes intended as a record of persons liable for the debts of the company, and is so in the case of national banks; but the great weight of authority is that it is not intended for the benefit of creditors of the individual shareholders. Some of the courts hold that the unrecorded transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is acquired. That point is unimportant.

4. The statutes of many, perhaps of most, of the States, provide that certain conveyances of land and of chattels shall be recorded, and that until record is made a conveyance shall have no effect excepting between the parties, and, in most cases, those having actual notice. An attaching or seizing creditor, without notice of a prior conveyance, is, undoubtedly, within the words of these statutes; and so such creditors have come to be treated, and even spoken of, as in some sort purchasers. A few of the statutes requiring registration of the shares of companies follow the exact language of these registry laws, and declare that no unrecorded title shall be good, or only against persons having notice. In California, even, such a law is held not to avail creditors, (*Winter v. Belmont Co.* 53 Cal. 428;) but in Maine and Massachusetts, the decision, and perhaps the better one, is that such a law must be construed like other similar registry laws. *Skowhegan Bank v. Cutler*, 49 Me. 315; *Rock v. Nichols*, 3 Allen, 342. It was in this state of things that the case which is the support of the defence here was decided. In *Fisher v. Essex Bank*, 5 Gray, 373, the charter of a bank incorporated in Massachusetts provided that the shares should be transferred only at the banking house, and upon the books of the company, and the court held that an attaching creditor could hold against an earlier unrecorded transfer for value. I have studied this decision with care. It seems to proceed upon the theory that by the charter, which is a public statute, there can be no such thing as an equitable transfer, or, at any rate, none except by a sort of equitable estoppel between the parties, and that it was a part of the intent of the act that a creditor at law should have the legal right to attach the legal title. This decision has been followed in Illinois, (*People's Bank v. Gridley*, 91 Ill. 457,) but rejected in the other states, so far as their courts have passed upon it. It is sometimes spoken of as being the law of Connecticut and Vermont, but the early cases in the former state are much modified by *Colt v. Ives*, 31 Conn. 25. The case cited from Vermont (*Rice v. Curtis*, 32 Vt. 464) is not in point. It is opposed directly to many of the cases already cited under the third point, and to the general principle that attaching creditors are bound by all equities, including equitable estoppels. It has, moreover, been seriously modified, if not wholly overruled in Massachusetts, in *Dickinson v. Central Nat. Bank*, 129 Mass. 279, printed, but not yet published. The Central National Bank had a by-law like that now in question, and A., the owner of ten of its shares, had transferred them by way of security, precisely as Conant transferred his shares, and afterwards became bankrupt. The transferee, still later, sold the shares at public auction, under his power, after due notice to A. and to his assignee. The bank, notwithstanding a notice and demand by the assignee in bankruptcy, transferred the shares to the purchaser. The assignee sued the bank for damages, but was defeated. *Colt, J.*, delivering the opinion of the court, says that *Fisher v. Essex Bank*, *ubi supra*, does not apply, because in that case the charter had the force of a general law, but that a by-law has no such effect, (citing *Sargent*

v. *Essex Marine R. Co.* 9 Pick. 201,) and that in the absence of such a general law the transferee took an equitable title which should prevail against the assignee in bankruptcy of the transferor. The only circumstances in *Fisher v. Essex Bank*, not found in *Dickinson v. Central Bank*, are these: (1) The law in the former case contained the word "only" — that the shares should be transferred only so and so; (2) that an attaching creditor and not an assignee in bankruptcy was concerned; (3) that the law governing the company was a Massachusetts law, which might be differently construed from a national banking act. The first and third points, of course, are the same in this case as in the later one in Massachusetts. The second is not sound in this court; an assignee and attaching creditor stand precisely alike, according to the law which governs this controversy.

5. The doctrine of *Dearle v. Hall*, 3 Russ. 1, confirmed in *Foster v. Cockerell*, 3 Cl. & Fin. 466, is much relied on by the defendants. This doctrine is that of two innocent purchasers of merely equitable interests he shall be preferred who first gives notice to the trustee or holder of the legal title. To this there are several answers: 1. Though the corporation is for some purposes a trustee for the shareholders, the latter have an independent legal property in their shares which they can convey, and whether their actual conveyance is legal or equitable is of no consequence. 2. The doctrine applies in England only to purchasers, and not to creditors seizing or attaching, even though a statute gives a right to seize all shares standing in the debtor's name in his own right. This statute was once held by the Queen's Bench to mean that the creditor might seize what the register showed to be apparently the property of the debtor, (*Watts v. Porter*, 3 E. & B. 743;) but this has been overruled, on the ground that the legislature cannot be supposed to have intended to take one man's property for another man's debt, without the most explicit statement of such a purpose; and therefore the "right" refers to the equitable as well as legal right. *Dunster v. Lord Glengall*, 3 Ir. Ch. 47; *Scott v. Lord Hastings*, 4 K. & J. 633; *Beavan v. Earl of Oxford*, 6 D. M. & G. 524; *Eyre v. McDonald*, 9 H. L. 619; *Robinson v. Nesbitt*, L. R. 3 C. P. 264; *Pickering v. Ilfracombe Railway Co.* L. R. 3 C. P. 235; *Gill v. Continental Gas Co.* L. R. 7 Ex. 619.

A few courts in this country have carried the doctrine of *Dearle v. Hall* so far as to uphold the garnishment of a non-negotiable debt which had been equitably assigned without notice. We have already seen that this is not the law in England nor in Massachusetts. Neither is it the law of the United States generally. *Drake, Attachments*, c. 24; *Cornick v. Richards*, 3 Lea. 1. The supreme court of Tennessee in that case refused to extend the rule to shares of stock, though it applies in that state to *choses in action*. As shares are not *choses in action*, and as attaching creditors are not purchasers, *Dearle v. Hall* is not in point.

6. It remains only to cite two decisions of the supreme court, which, in principle, are decisive of this case. In *Bank v. Lanier*, 11 Wall. 369,

a national bank was required to make good to the holder of an unrecorded certificate the value of his shares, although they had been transferred on the books to a subsequent purchaser for value. That purchaser, to be sure, was not before the court, but if his title was better than that of the plaintiff, the bank was justified in transferring the shares and would have had a perfect defence. *Dickinson v. Central Nat. Bank*, 129 Mass. 279; *Gill v. Continental Gas Co.* L. R. 7 Ex. 232. If a purchaser for value could not hold against the holder of the unrecorded certificate, *a fortiori* of an attaching creditor.

Bullard v. The Bank, 18 Wall. 589, is in the same line of thought. It decides that certificates of shares in national banks are so far negotiable, or *quasi* negotiable, that a by-law of the bank, which undertakes to make them subject to the debt of the transferor to the bank itself, is void. On the same ground it was held that a by-law like that of the Eliot National Bank, if intended to give attaching creditors a better title than transferees who had not recorded their certificates, was void. *Sargent v. Marine Ry. Co.* 9 Pick. 201. Here, again, the argument is *a fortiori*. If the bank cannot create a lien by its by-law, much less can it obtain one indirectly, by attachment, upon the construction of an ambiguous by-law.

My conclusion is that the attachment of Conant's shares cannot prevail against the complainants' earlier title, whether that is equitable or legal. There is no conflict of jurisdiction, because no state court or officer has taken possession of anything. The question is merely one of title. A bill in equity will lie, because the complainant company has, or might have, a right to require the shares to be transferred to it. As values are at present, it would be more just to enter a decree for the debt due the complainants, and interest, which would leave a considerable value for the defendant bank if the present market price holds. I understood counsel to say that the precise form of the decree could probably be agreed on.

Decree for the complainants.

APPENDIX.

SALOMON *v.* SALOMON & CO., LIMITED.

CROSS appeals from the decision in *Broderip v. Salomon*, *ante* p. 81, were argued in the House of Lords, June 15, 22, 29, 1896. A decision was given Nov. 16, 1896; reversing the order appealed from by Aron Salomon; and affirming that part of the order which refused the prayer of the company for a rescission of the contract. The cause was remitted to the Chancery Division. The decision is reported, under the name of *Salomon v. Salomon & Co., Limited*, in Law Reports (1897), Appeal Cases, 22.

The opinions¹ delivered are as follows (omitting, in some instances, statements of fact and recitals of previous proceedings in the litigation.)

LORD HALSBURY, LORD CHANCELLOR. My Lords: The important question in this case, and I am not certain that it is not the only question, is whether the respondent company was a company at all; whether, in truth, that artificial creation of the Legislature had been validly constituted in this instance; and, in order to determine that question, it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal with them presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to anyone, and certainly not to these persons themselves, to deny that they were shareholders.

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still

¹ The opinions are found in 75 Law Times, N. s. p. 427-437. — ED. °

less is it possible to contend that the motive of becoming shareholders, or of making them shareholders, is a field of inquiry which the statute itself recognises as legitimate. If they are shareholders they are shareholders for all purposes, and, even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the *cestui que trusts* of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities; and dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence, quite apart from the motives or conduct of individual corporators. In saying this I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer intrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But, short of such proof, it seems to me impossible to dispute that once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned judge (Williams, J.) held that the business was Mr. Salomon's business and no one else's, and that he chose to employ as agent a limited company. And he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent—the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon; if it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

Lindley, L. J., on the other hand, affirms that there were seven

members of the company, but, he says, it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done.

It is obvious to inquire where is that intention of the Legislature manifested in the statute? Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven members must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the Legislature — a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

As one mode of testing the proposition it would be pertinent to ask whether two or three, or, indeed, all seven, may constitute the whole of the shareholders. Whether they must be all independent of each other in the sense of each having an independent beneficial interest — and this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person?

I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted — that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. Lopes, L. J. says: "The Act contemplated the incorporation of seven independent *bonâ fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader." The words "seven independent *bonâ fide* members with a mind and will of their own and not the puppets of an individual" are by construction to be read into the Act. Lopes, L. J., also said that the company was a mere *nominis umbra*. Kay, L. J. says: "The statutes were intended to allow seven or more persons *bonâ fide* associated for the purpose of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of enabling an indi-

vidual to carry on his own business with limited liability in the name of a joint-stock company.

The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Williams, J. appears to me to have disposed of the argument that the company, which for this purpose he assumed to be a legal entity, was defrauded into the purchase of Aron Salomon's business, because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognisant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

The proposition laid down in *Erlanger v. The New Sombbrero Phosphate Company* (39 L. T. Rep. 269; 3 App. Cas. 1218) — I quote the head-note — is, that “Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it. But if every member of the company, every shareholder, knows exactly what is the true state of the facts, which for this purpose must be assumed to be the case here, Williams, J.'s conclusion seems to me to be inevitable — that no case of fraud upon the company could here be established. If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

The truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they considered the inexpediency of permitting one man to be, in influence and authority, the whole company, and assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law, and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below, but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which

are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shown to have done, or to have intended to do, anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

The result is that I move your Lordships that the judgment appealed from be reversed, but as this is a pauper case I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that this appeal be dismissed with costs to the same extent.

LORD WARSON. My Lords: This appeal raises some questions of practical importance, depending upon the construction of the Companies Acts, which do not appear to have been settled by previous decisions. As I am not prepared to accept without reservation all the conclusions of fact which found favour with the courts below, I shall, before adverting to the law, state what I conceive to be the material facts established by the evidence before us.

[After making a full statement of facts, the opinion proceeds.]

The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the averments made on amendment, were meant to convey a charge of fraud, and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose the specific facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was a fraud upon the company and its members, or upon persons who had dealings with the company, is not indicated, although there may be very different considerations applicable to those two cases. The *res gestæ* which might imply that it was the appellant, and not the company, who actually carried on its business are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits, without any risk beyond loss of the money which he has paid for or is liable to pay upon his shares, and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish that risk. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant, I cannot gather from the record, and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider.

No additional proof was given after the amendment of the counter-claim. The oral testimony has very little, if any, bearing upon the second claim; and any material facts relating to the fraudulent objects which the appellant is said to have had in view, and the alleged position of the company as his nominee or agent, must be mere matter of inference derived from the agreements of the 20th July and the 2nd Aug. 1892, the memorandum and articles of association, and the minute-book of the company.

On rehearing the case, Williams, J., without disposing of the origi-

nal claim, gave the company decree of indemnity in terms of their amended claim. I do not profess my ability to follow accurately the whole chain of reasoning by which the learned judge arrived at that conclusion, but he appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere "dummies," and consequently that the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an *alias* for Aron Salomon. On appeal from his decision the Court of Appeal, consisting of Lindley, Lopes, and Kay, L.JJ., made an order finding it unnecessary to deal with the original claim, and dismissing the appeal in so far as it related to the amended claim. The ratio upon which that affirmation proceeded, as embodied in the order, was, "This court, being of opinion that the formation of the company, the agreement of Aug. 1892, and the issue of debentures to Aron Salomon, pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company, with limited liability, contrary to the intent and meaning of the Company's Act 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." The opinions delivered by the Lords Justices are strictly in keeping with the reasons assigned in their order. Lindley, L.J., after observing "that the incorporation of the company cannot be disputed," refers to the scheme of the formation of the company, and says, "the object of the whole arrangement is to do the very thing which the Legislature intended not to be done"; and he adds that "Mr. Salomon's scheme is a device to defraud creditors."

Assuming that the company was well incorporated in terms of the Act of 1862, an assumption upon which the decisions appealed from appear to me to throw considerable doubt, I think it expedient before considering the amended claim, to deal with the original claim for rescission, which was strongly pressed upon us by counsel for the company, under their cross appeal. Upon that branch of the case there does not appear to me to be much room for doubt. With this exception, that the word "exorbitant" appears to me to be too strong an epithet, I entirely agree with Williams, J., when he says, "I do not think that when you have a private company, and all the shareholders in the company are perfectly cognisant of the conditions under which the company is formed, and the conditions of the purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price) is a fraud upon those shareholders or upon the company." The learned judge goes on to say that the circumstances might have amounted to fraud if there had been an intention on the part of the original shareholders "to allot further shares at a later period to future allottees." Upon that point I do not find it necessary to express any opinion; because it is not raised by the facts of the case, and in any view, these

considerations are of no relevancy in a question as to rescission between the company and the appellant.

Mr. Farwell argued that the agreement of the 2nd Aug. ought to be set aside, upon the principle followed by this House in *Erlanger v. New Sombrero Phosphate Company* (39 L. T. Rep. 269; 3 App. Cas. 1218). In that case the vendor, who got up the company, with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false. The directors, who were virtually his nominees, purchased from him without being aware of the real facts; and on their assurance that, in so far as they knew, all was right, the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and it was set aside at the instance of the liquidator, the Lord Chancellor (Earl Cairns) expressing a doubt whether, even in those circumstances, the remedy was not too late, after a liquidation order. But in this case the agreement of the 20th July was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were or were likely to be members of the company. In my opinion, therefore, *Erlanger v. New Sombrero Phosphate Company* has no application, and the original claim of the liquidator is not maintainable.

The Lords Justices of Appeal, in disposing of the amended claim, have expressly found that the formation of the company, with limited liability, and the issue of 10,000*l.* worth of its debentures to the appellant, were "contrary to the true intent and meaning of the Companies Act 1862." I have had great difficulty in endeavouring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley, L. J.) does the very thing which the Legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. "Intention of the Legislature" is a common, but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the Appeal Court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counter-claim preferred by its liquidator must fail. If that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and sever-

ally responsible for the debts incurred by them in the name of the company. I can conceive that there might be a limited company formed and registered by a person who had the sole interest in it, the other subscribing members being persons who were his *aliases*, and having no real existence; and in that case also (which does not occur here) there would be no legal company, and the real owner of the concern would be liable for its debts to the full extent of his means.

The provisions of the Act of 1862 which seem to me to have any bearing upon this point lie within a very narrow compass. Sect. 6 provides that any seven or more persons, associated for a lawful purpose, such as the manufacture and sale of boots, may, by subscribing their names to a memorandum of association and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability; and sect. 8, which prescribes the essentials of the memorandum in the case of a company limited by shares, *inter alia*, enacts that "no subscriber shall take less than one share." The first of these enactments does not require that the persons subscribing shall not be related to each other, and the second plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the Act. Nor does the statute, either expressly or by implication impose any limit upon the number of shares which a single member may subscribe for or take by allotment. At the date of registration all the requirements of the Act had been complied with, and, as matters then stood, there does not appear to have been any room for the pleas now advanced by the liquidator. The company was still free to modify or reject the agreement of the 20th July, and the fraud of which the appellant has been held guilty by the Court of Appeal, though it may have existed *in animo*, had not been carried into execution by the acceptance of the agreement, the issue of debentures to the appellant under the terms of it and by his receiving an allotment of shares which increased his interest in the company to $\frac{30000}{100000}$ of its actual capital. I have already intimated my opinion that the acceptance of the agreement is binding on the company; and neither that acceptance, nor the preponderating share of the appellant, nor his payment in debentures, being forbidden by the Act, I do not think that any of those things could subsequently render the registration of the company invalid. But I am willing to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequence incur personal liability. In this case the fraud is found to have been committed by the appellant against the creditors of the company, but it is clear that if so, though he may have been its originator and the only person who took benefit from it, he could not have done any of those things which, taken together, are said to constitute his fraud without the consent and privity of the other shareholders. It seems doubtful whether a liquidator, as representing

and in the name of the company, can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders. However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact.

The memorandum of association gave notice that the main object for which the company was formed was to adopt, and carry into effect, with or without modifications, the agreement of the 20th July 1892, under the terms of which the debentures for 10,000*l.* were subsequently given to the appellant in part payment of the price. By the articles of association — art. 62 (*e*) — the directors were empowered to issue mortgage or other debentures or bonds for any debts due, or to become due, to the company; and it is not alleged or proved that there was any failure to comply with sect. 43 or the other clauses of Part III. of the Act, which relate to the protection of creditors. The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the Act provides, could have informed themselves of the terms of purchase by the company, of the issue of debentures to the appellant, and of the amount of shares held by each member. In my opinion the statute casts upon them the duty of making inquiry in regard to these matters. Whatever may be the moral duty of a limited company and its shareholders, when the trade of the company is not thriving, the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures. But the apathy of a creditor cannot justify an imputation of fraud against a limited company or its members, who have provided all the means of information which the Act of 1862 requires. And, in my opinion, a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself must bear the consequences of his own negligence.

For these reasons I have come to the conclusion that the orders appealed from ought to be reversed, with costs to the appellant here and in both courts below. His costs in this House must, of course, be taxed in accordance with the rule applicable to pauper litigants.

LORD HERSCHELL. [After stating the facts, and reciting the previous proceedings.]

It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at loss to understand what is meant by saying that A. Salomon and Company Limited is but an *alias* for A. Salomon. It is

not another name for the same person; the company is *ex hypothesi* a distinct legal *persona*. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled substantially to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

The Court of Appeal based their judgment on the proposition that the formation of the company, and all that followed it, was a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their *cestui que trust*. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company, and the transfer to it of the business, is that, whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference; the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion all these companies must,

I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable, without limit, to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think that the learned judges in the court below have contemplated the application of their judgment to such cases as I have been considering, but I can see no solid distinction between those cases and the present one.

It is said that the respondent company is a "one-man" company, and that in this respect it differs from such companies as those to which I have referred. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided in each case the requirements of the statute have been complied with, and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit as regards one of the shareholders, of unlimited liability. I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with, and this leads naturally to the inquiry what are those requirements?

The Court of Appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant, were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition or trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please; the statute prescribes no minimum, and though there must be seven shareholders, it is enough if each of them holds one

share, however small its denomination. The Legislature therefore clearly sanctions a scheme by which all the shares, except six, are owned by a single individual, and these six are of a value little more than nominal.

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion it makes no difference. The statute forbids the entry in the register of any trust, and it certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum or who have agreed to become members of the company, and whose names are on the register, are alone regarded as, and, in fact, are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do; it concerns only them and their *cestui que trust* if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?

It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorising limited liability was passed; that if what is possible under the enactments as they stand had been foreseen, a minimum sum would have been fixed as the least denomination of share permissible, and it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company, and how it is held.

I have hitherto made no reference to the debentures which the appellant received in part payment of the purchase money of the business which he transferred to the company. These are referred to in the judgment as part of the scheme which is pronounced contrary to the true intent and meaning of the Companies Act. But if apart from this the conclusion that the appellant is bound to indemnify the company against its debts cannot be sustained, I do not see how the circumstance that he received these debentures can avail the respondent company. The issue of debentures to the vendor of a business as part of the price is certainly open to great abuse, and has often worked grave mischief. It may well be that some check should be placed upon the practice, and that at all events, ample notice to all who may have deal-

ings with the company should be secured. But as the law at present stands there is certainly nothing unlawful in the creation of such debentures. For these reasons I have come to the conclusion that the appeal should be allowed.

It was contended on behalf of the company that the agreement between them and the appellant ought at all events, to be set aside on the ground of fraud. In my opinion no such case has been made out, and I do not think that the respondent company are entitled to any such relief.

Lord MACNAGHTEN. My Lords: I cannot help thinking that the appellant, Aron Salomon, has been dealt with somewhat hardly in this case.

Mr. Salomon, who is now suing as a pauper, was a wealthy man in July 1892. He was a boot and shoe manufacturer, trading on his own sole account under the firm of "A. Salomon and Co.," in High-street, White-chapel, where he had extensive warehouses and a large establishment. He had been in the trade over thirty years. He had lived in the same neighbourhood all along, and for many years past he had occupied the same premises. So far things had gone very well with him. Beginning with little or no capital he had gradually built up a thriving business, and he was undoubtedly in good credit and repute.

It is impossible to say exactly what the value of the business was. But there was a substantial surplus of assets over liabilities. And it seems to me to be pretty clear that, if Mr. Salomon had been minded to dispose of his business in the market as a going concern, he might fairly have counted upon retiring with at least 10,000*l.* in his pocket.

Mr. Salomon, however, did not want to part with the business. He had a wife and a family consisting of five sons and a daughter. Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners; they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. "They troubled me," says Mr. Salomon, "all the while." So at length Mr. Salomon did what hundreds of others have done under similar circumstances; he turned his business into a limited company. He wanted, he says, to extend the business and make provision for his family. In those words, I think, he fairly describes the principal motives which influenced his action.

All the usual formalities were gone through; all the requirements of the Companies Act 1862 were duly observed. There was a contract with a trustee in the usual form for the sale of the business to a company about to be formed. There was a memorandum of association duly signed and registered, stating that the company was formed to carry that contract into effect, and fixing the capital at 40,000*l.* in 40,000 shares of 1*l.* each. There were articles of association providing the usual machinery for conducting the business. The first directors

were to be nominated by the majority of the subscribers to the memorandum of association. The directors, when appointed, were authorised to exercise all such powers of the company as were not by statute or by the articles required to be exercised in general meeting; and there was express power to borrow on debentures, with the limitation that the borrowing was not to exceed 10,000*l.* without the sanction of a general meeting.

The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public. The subscribers to the memorandum were Mr. Salomon, his wife, and five of his children who were grown up.

The subscribers met and appointed Mr. Salomon and his two elder sons directors. The directors then proceeded to carry out the proposed transfer. By an agreement dated the 2nd Aug. 1892 the company adopted the preliminary contract, and in accordance with it the business was taken over by the company as from the 1st of June 1892. The price fixed by the contract was duly paid. The price on paper was extravagant. It amounted to over 39,000*l.*, a sum which represented the sanguine expectations of a fond owner rather than anything that can be called a businesslike or reasonable estimate of value. That, no doubt, is a circumstance which, at first sight, calls for observation, but when the facts of the case and the position of the parties are considered, it is difficult to see what bearing it has on the question before your Lordships. The purchase money was paid in this way: as money came in, sums amounting to 20,000*l.* were paid to Mr. Salomon, and then immediately returned to the company in exchange for fully-paid shares. The sum of 10,000*l.* was paid in debentures for the like amount. The balance, with the exception of about 1,000*l.*, which Mr. Salomon seems to have received and retained, went in discharge of the debts and liabilities of the business at the time of the transfer, which were thus entirely wiped off. In the result, therefore, Mr. Salomon received for his business about 1,000*l.* in cash, 10,000*l.* in debentures and half the nominal capital of the company in fully-paid shares for what they were worth. No other shares were issued except the seven shares taken by the subscribers to the memorandum, who, of course, knew all the circumstances, and had therefore no ground for complaint on the score of over valuation.

The company had a brief career; it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen too, and in view of that danger, contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could; both he and his wife lent the company money, and then he got his debentures can-

celled and reissued to a Mr. Broderip, who advanced him 5,000*l.*, which he immediately handed over to the company on loan. The temporary relief only hastened ruin. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realised enough to pay Mr. Broderip, but not enough to pay the debentures in full, and the unsecured creditors were consequently left out in the cold.

In this state of things the liquidator met Mr. Broderip's claim by a counter-claim, to which he made Mr. Salomon defendant. He disputed the validity of the debentures on the ground of fraud. On the same ground he claimed rescission of the agreement for the transfer of the business, cancellation of the debentures, and repayment by Mr. Salomon of the balance of the purchase money. In the alternative he claimed payment of 20,000*l.* on Mr. Salomon's shares, alleging that nothing had been paid on them.

When the trial came on before Williams, J., the validity of Mr. Broderip's claim was admitted, and it was not disputed that the 20,000 shares were fully paid up. The case presented by the liquidator broke down completely. But the learned judge suggested that the company had a right of indemnity against Mr. Salomon. The signatories of the memorandum of association were, he said, mere nominees of Mr. Salomon, mere dummies. The company was Mr. Salomon in another form. He used the name of the company as an *alias*. He employed the company as his agent; so the company he thought, was entitled to indemnity against its principal. The counter-claim was accordingly amended to raise this point, and on the amendment being made the learned judge pronounced an order in accordance with the view he had expressed.

The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed, the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith," to use the words of the enactments, "of exercising all

the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority; no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Mr. Salomon appealed. But his appeal was dismissed with costs, though the appellate court did not entirely accept the view of the court below. The decision of the Court of Appeal proceeds on a declaration of opinion embodied in the order which has been already read.

I must say that I, too, have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed himself to the full of the advantages offered by the Act of 1862, what is there wrong in that? Leave out the words "contrary to the true intent and meaning of the Companies Act 1862," and bear in mind that "the creditors of the company" are not the creditors of Mr. Salomon, and the declaration is perfectly innocent, it has no sting in it.

In an early case which in some of its aspects is not unlike the present, the owners of a colliery (to quote the language of Giffard, L. J., in the Court of Appeal) "went on working the colliery not very successfully, and then determined to form a limited company, in order to avoid incurring further personal liability." "It was," adds the Lord Justice, "the policy of the Companies Act to enable this to be done." And so he reversed the decision of Malins, V. C., who had expressed an opinion that if the laws of the country sanctioned such a proceeding they were "in a most lamentable state," and had fixed the former owners with liability for the amount of the shares they took in exchange for their property. (*Re Baglan Hall Colliery Company*, 23 L. T. Rep. 60; L. Rep. 5 Ch. 346.)

Among the principal reasons which induce persons to form private companies as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law. A company too can raise money on debentures, which an ordinary trader cannot do; any

member of a company acting in good faith is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say that I can find nothing in the evidence to support such an imputation. The purpose for which Mr. Salomon and the other subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised 5,000% for the company on debentures that belonged to him seems to me strong evidence of his good faith and of his confidence in the company. The unsecured creditors of A. Salomon and Co. Limited may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognisant of the memorandum and of the articles of association. For such a catastrophe as has occurred in this case some would blame the law that allows such a thing as a floating charge. But a floating charge is too convenient a form of security to be lightly abolished. I have long thought, and I believe some of your Lordships also think, that the ordinary trade creditors of a trading company ought to have a preferential claim on the assets in liquidation in respect of debts incurred within a certain limited time before the winding-up. But that is not the law at present. Everybody knows that when there is a winding-up, debenture holders generally step in and sweep off everything. And a great scandal it is.

It has become the fashion to call companies of this class "one-man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading; if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

One argument was addressed to your Lordships which ought perhaps to be noticed, although it was not the ground of decision in either of the courts below. It was argued that the agreement for the transfer of the business to the company ought to be set aside, because there was no independent board of directors, and the property was transferred at an over value. There are, it seems to me, two answers to that argu-

ment. In the first place, the directors did just what they were authorised to do by the memorandum of association. There was no fraud or misrepresentation, and there was nobody deceived. In the second place, the company have put it out of their power to restore the property which was transferred to them. It was said that the assets were sold by an order made in the presence of Mr. Salomon, though not with his consent, which declared that the sale was to be without prejudice to the rights claimed by the company by their counter-claim. I cannot see what difference that makes. The reservation in the order seems to me to be simply nugatory.

I am of opinion that the appeal ought to be allowed and the counter claim of the company dismissed with costs, both here and below.

LORD MORRIS. My Lords: I quite concur in the judgment which has been announced, and in the reasons which have been so fully given for it.

LORD DAVEY. My Lords: It is possible, and (I think) probable, that the conclusion to which I feel constrained to come in this case may not have been contemplated by the Legislature, and may be due to some defect in the machinery of the Act. But, after all, the intention of the Legislature must be collected from the language of its enactments; and I do not see my way to holding that if there are seven registered members, the association is not a company formed in compliance with the provisions of the Act, and capable of carrying on business with limited liability either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called "dummies," holding, it may be, only one share of 1*l.* each; or because there are less than seven persons who are beneficially entitled to the shares.

I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share, the provision in sect. 8 that no subscriber shall take less than one share, and the provision in sect. 30, that no notice of any trust shall be entered on the register. With regard to the latter provision, it would, in my opinion, be impossible to work the machinery of the Act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. The learned counsel for the respondents (wisely, as I think), did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were "dummies," and did not hold a substantial interest in the company — *i. e.*, what a jury would say is a substantial interest. In the language of some of the judges in the court below, any jury, if asked the question, would say the business was Aron Salomon's, and no one else's.

It was not argued in this case that there was no association of seven persons to be registered, and that the registration therefore operated nothing, or that the so-called company was a sham and might be disregarded. And, indeed, it would have been difficult for the learned counsel for the respondents appearing, as they did, at your Lordships'

bar for the company who had been permitted to litigate in the courts below as actors on their counter-claim, to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that sect. 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it.

We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts and be wound-up, and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities. Williams, J., held that the company was an *alias* for the appellant, who carried on his business through the company as his agent, and that he was bound to indemnify his own agent, and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to *cestui que trust*.

The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe in passing that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant, and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer. By an *alias* is usually understood a second name for one individual, but here, as one of your Lordships has already observed, we have, *ex hypothesi*, a duly formed legal *persona*, with corporate attributes, and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be pro-

ceeded against civilly or criminally; but how either of these states of circumstances creates the relation of *cestui que trust* and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be supported on the grounds stated by the learned judges.

But Mr. Farwell also relied on the alternative relief claimed by his pleadings, which was quite open to him here, viz., that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price, and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business) was so excessive as to afford grounds for rescission, and as regards the cash portion of the price it must be observed that as the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible. Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members. In fact, it was impossible to say who was defrauded.

Mr. Farwell relied on some dicta in *Erlanger v. New Sombrero Company*, a case which is often quoted and not unfrequently misunderstood. Of course Lord Cairns' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and directors before the shares were offered for subscription, whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding, and exercised no judgment of their own. It has nothing to do with the present case. That a company may contract with the holder of the bulk of its shares, and such contract will be binding, though carried only by the votes of that shareholder, was decided in *North-West Transportation Company v. Beatty* (57 L. T. Rep. 426; 12 App. Cas. 589). For these reasons I am of opinion that the appellant's appeal should be allowed and the cross appeal should be dismissed. I agree to the proposed order as to costs.

